LUIS MIGUEL M. DEL ROSARIO
217 E 89th Street #4B, New York, NY 10128 | ldelrosario2@fordham.edu | (818) 635-3723

WRITING SAMPLE

The following document is a judicial opinion that I prepared for an Upper-Class Legal Writing Workshop taught by Professor Ilene Strauss at Fordham University School of Law.

The opinion decides an appeal concerning the constitutionality of a search conducted by a private citizen. It is being submitted with the express approval of Professor Strauss. It is entirely my own work product and reflects edits I made in response to feedback from Professor Strauss regarding the structure of a draft. It is the final version I submitted for grading.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

BENJAMIN WILLIAMS,
Defendant-Appellant.

No. CR 4359283JN-21

OPINION

On Appeal From The United States District Court
For The Southern District of California
Benito C. Garcia, District Judge, Presiding

Argued and Submitted April 18, 2023
San Diego, California

Filed May 17, 2023

Before:
Luis del Rosario, Ilene Strauss, Nicholas W. Haddad,
Circuit Judges.

Opinion by Judge del Rosario

OPINION

This appeal arises from the San Diego Police Department's diligent efforts to solve a 1994 bank robbery-turned-murder. Appellant Benjamin Williams was arrested in connection with those events after his co-worker, Emma Ruthen, engaged in sustained communications with local law enforcement and obtained DNA evidence for them by searching Williams's backpack and stealing his mug. The DNA obtained from the mug led to Williams's arrest and indictment. Before trial, Williams moved to suppress that evidence. The district court denied his motion, and Williams was tried and convicted based largely on that evidence.

Williams now challenges the denial of his motion to suppress. Now the question before us is not whether Williams committed the crime, but whether Ruthen's warrantless search and seizure constitutes permissible, private action or impermissible, state action. We conclude that Ruthen's search and seizure constitutes state action, based on our circuit's well-established, two-pronged test. First, the government knew of and acquiesced to Ruthen's conduct because a detective communicated directly with Ruthen over an extended period during which she taught Ruthen how to conduct the search and seizure. Second, none of Ruthen's advanced motives were legitimate or independent of her motive to aid the police. We therefore reverse the district court's suppression ruling, vacate Williams's conviction, and remand for further proceedings consistent with this opinion.

BACKGROUND

In July 2021, Detective Chantelle Ward of the San Diego Police Department was assigned to investigate a 1994 bank robbery that led to the murder of Herbert

Kowalski. R-15. After receiving the case files, Ward and her partner followed up on an old lead that pointed to a local pastry chef, appellant Benjamin Williams. R-15–16. Williams was not around when Ward and her partner visited him at work in September 2021, so one of his co-workers approached them instead. R-17. That co-worker, Emma Ruthen, introduced herself as a true crime enthusiast. R-17–18. After Ward relayed that she was there to speak to Williams about a cold case, Ruthen became "very intrigued." R-18. As it turns out, Ruthen was part of a group called "Truly Criminal" that competitively investigated cold cases, but she had never won because she could not come up with a winning theory for any of the cases the group studied. R-27. Before leaving, Ward gave Ruthen her card and asked her to "be in touch if anything came up." R-18. Five phone calls followed.

Ruthen called first, two days later. *Id.* During that call, Ruthen indicated that she was familiar with the Kowalski case because Truly Criminal was "exploring" it at the time. R-26. So, after Ward confirmed Ruthen's hunch that she was also working on the Kowalski case, Ruthen asked whether "it would be helpful for her to get a sample of [Williams's] DNA." R-19. Ward responded that "DNA evidence is always helpful." *Id.* Ruthen called again a few days later to ask specifically whether "saliva was helpful," to which Ward responded "yes, . . . as long as it remains untainted." *Id.* When Ruthen called a third time two days later, she indicated that she was "contemplating taking something that had [Williams's] DNA on it," and Ward counseled that "[t]hings like cups, soda cans, mouth guards . . . tend to work better." R-20. When Ruthen asked whether a coffee mug "would do

the trick," Ward said yes and specified that the mug would have to be "used recently" and "couldn't be disturbed by washing the cup or wiping the rim." *Id.*

Ward testified that, at that point, "it seemed that [Ruthen] had some sort of plan." R-23. So, she called Ruthen the next day to tell her to be careful around Williams. R-20. In response, Ruthen thanked Ward for the advice, then asked her whether she would "be around the station the next week." *Id.* Ward said yes. *Id.* When Ruthen called Ward for the fourth time, she informed Ward that she had taken a travel coffee mug from Williams. R-20–21. She then asked Ward how to handle it because "she really wanted the evidence to be usable." R-20–21. Ruthen showed up at the station with the mug twenty minutes after Ward told her to "just turn it in." R-21. Ward told Ruthen that "she had done a good thing." R-21.

The saliva on the mug matched the DNA on file. R-22. So, on December 11, 2021, a grand jury indicted Williams on one count of violating 18 U.S.C. § 2113. R-3–4. Before trial, Williams moved to suppress the DNA evidence collected from the mug taken by Ruthen. R-5–11. At the suppression hearing, Ruthen testified that she "wanted to solve the case," R-29, because she "believe[d] in the importance of sound police investigations and of the community pulling together to help out," R-25, as much as she wanted to win Truly Criminal, R-31. She also testified that Ward did not explicitly direct her to take the mug, but that "[Ward] helped me figure it out." R-28. According to Ward, "that level of engagement with someone who isn't directly related to the investigation is not common." R-22.

The district court denied Williams's suppression motion. Recognizing that

the decision presented "a close call," the court held that Williams nevertheless failed to demonstrate that Ruthen acted as an agent of the government. R-34. Although Ward was "aware[] of Ruthen's general goal . . . [her] involvement was not directive, in any way, and indeed, Ward wasn't even present" when Ruthen took the mug. R-33. The district court also held that Ruthen's desire to help solve the crime for her community and to become the member of her true crime group "to do it best" did not amount to an intent to benefit the police. R-33. The case proceeded to trial, and Williams was convicted in November 2022. R-35–36. This appeal followed. R-37.

ANALYSIS

Under the Fourth Amendment, searches and seizures conducted without a warrant are "per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Coolidge v. New Hampshire*, 91 S. Ct. 2022, 2032 (1971). The Fourth Amendment does not prohibit wrongful searches or seizures conducted by private parties, but it does prohibit them when private parties "act[] as government instruments or agents." *United States v. Reed*, 15 F.3d 928, 931 (9th Cir. 1994). When determining whether the person who conducted a wrongful search or seizure was a private person or an agent of the state, this court looks to (1) the government's knowledge and acquiescence and (2) the intent of the party that performed the search. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981). It is the defendant's burden to establish government involvement. *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1995). Because the appellant challenges the legal conclusions underlying the district court's suppression ruling, this court reviews the district court's decision de novo. *Reed*, 15 F.3d at 930.

I. The Government's Knowledge and Acquiescence

Applying the test from *Walther*, we first ask whether the police had "some degree of knowledge and acquiescence in the search." 652 F.2d at 792. In analyzing this first element, we do not require proof of both knowledge and acquiescence. In other words, the two can function together as a single element when a private citizen conducts a warrantless search and seizure in the presence of government agents. In *United States v. Reed*, for example, this court found knowledge and acquiescence without providing separate reasons for each because the police accompanied a hotel manager to a guest's room and stood guard while the manager searched it for narcotics. 15 F.3d at 932–933. Although this case does not fall into the *Reed* line of knowledge-and-acquiescence cases, our analysis does not end there.

Instead, a finding of acquiescence can still fulfill the first element by itself—in other words, absent knowledge—when there are historical contacts between the government and the private party sufficient to place the government on notice that the private party might eventually engage in an unlawful search and seizure. In *United States v. Walther*, for example, we affirmed the suppression of drugs seized by an airline employee because the Drug Enforcement Administration had a long-standing practice of working with and paying that airline employee to search other packages for drugs. 652 F.2d at 792. Finding that "[t]he DEA either knew or should have known that [the employee] had made it a practice to inspect Speed Paks, and had acquiesced in that practice," we found acquiescence and affirmed the district court's suppression ruling without making a separate finding of knowledge.

This case is like *Walther*. Although Ward was not present for Ruthen's

eventual search, her many detailed conversations with Ruthen were sufficient to place her on notice that Ruthen might conduct a warrantless search and seizure. Over five phone calls, Ward told Ruthen about the case, R-18, told her that DNA evidence "is always helpful," R-19, counseled that saliva was specifically useful, *id.*, confirmed that saliva from "a coffee mug would do the trick," R-20, and told Ruthen how to handle the evidence, *id*. And above all, Ruthen explicitly said during their third call that she was "contemplating" taking something with Williams's DNA on it. R-20. Ward herself testified that "it seemed that [Ruthen] had some sort of plan" by then. R-23. But as she later relayed, Ward thought that Ruthen was doing "a good thing." R-21. Thus, Ward's choice to call Ruthen the next day to warn her to be careful around Williams—instead of asking her to avoid him entirely—evidences her acquiescence to Ruthen's plan to search for and seize Williams's mug. Based on these facts, we find that Ward either knew or should have known that Ruthen would take the mug, yet acquiesced to that act by failing to stop her.

This is sufficient even if Ward never knew the exact details of Ruthen's plan. The Fourth Amendment is implicated even when police "indirectly encourage a private person's search." *Reed*, 15 F.3d at 933. And Ward not only answered all of Ruthen's calls; she also helped Ruthen plan every major detail of the search. As Ruthen testified, "[Ward] helped me figure it out." R-28. Every time Ruthen took a step forward, Ward helped her take a second—when Ruthen asked whether saliva was helpful, Ward said that it had to remain untainted, R-19; when Ruthen shared that she wanted to take something with Williams's DNA on it, Ward said that cups,

cans, and mouth guards were specifically "better," R-20; and when Ruthen asked whether a coffee mug would work, Ward said that it would have to be used recently and preserved a certain way, R-20. We thus find knowledge and acquiescence where, as here, an officer slowly teaches a private citizen how to conduct a seizure, stopping short only of deciding exactly when, where, or how it would occur.

II. The Searching Party's Intent

We next analyze Ruthen's intent. The Fourth Amendment does not apply when a "private party has had a legitimate independent motivation for conducting [a] search." *Walther*, 652 F.2d at 792. Suppression, however, is proper when a private party "act[s] with the intent to assist the government in its investigatory or administrative purposes." *United States v. Attson*, 900 F.2d 1427, 1433 (9th Cir. 1990). Because findings of fact in a suppression ruling are reviewed only for clear error, *see Walther*, 652 F.2d at 791, we accept that Ruthen wanted to collect Williams's mug (1) to help solve the crime for her community and (2) to be the Truly Criminal member "to do it best." R-33. We analyze each motivation in turn.

First is Ruthen's motive to solve the crime for her community. This court has repeatedly held that only "a legitimate, independent motive *apart from crime detection or prevention* [may] immunize a search from scrutiny." *Cleaveland*, 38 F.3d at 1094 (emphasis added); *see also United States v. Mazzarella*, 784 F.3d 532, 540 (9th Cir. 2015) (rejecting "desire to 'do the right thing'" as legitimate motive); *Reed*, 15 F.3d at 932 (rejecting snooping to find evidence of criminal activity as legitimate motive). Accordingly, this first motive was not a legitimate one.

Next is Ruthen's motive to win Truly Criminal. When analyzing secondary

motives, this Court places particular importance on their bona fide independence from any motive to benefit the government. In *United States v. Cleaveland*, for example, we held that a utility worker's motive in entering a customer's property to check for power diversion was a properly independent business motive, even though the search benefitted the government because it uncovered contraband. 38 F.3d at 1094. Similarly, in *United States v. Attson*, this Court agreed that a doctor collected a patient's blood "for purely medical reasons" after that patient was brought to the hospital after a car accident, even though the blood was later used to help the government prosecute the patient for vehicular manslaughter. 900 F.2d at 1433. We ruled as such because neither the utility worker nor the doctor needed to help the police to achieve their own goals—the worker did not need the police to check for power diversion, and the doctor did not need the police to examine the blood.

Ruthen's motive to win Truly Criminal, by contrast, does not stand independently from her motive to help the government because she *needed to help* Ward to win. Tellingly, she made no attempt to win Truly Criminal by collecting Williams's DNA until she came into contact with Ward, even though her group was already investigating the case. Instead, Ruthen stayed close and worked with Ward to solve the case and ensure that any theory she came up with would be the winning one. Because Ruthen's motive to win *depended* on her helping Ward, we conclude that it was not independent from her motive to help the government.

CONCLUSION

We therefore **REVERSE** the suppression ruling, **VACATE** Williams's conviction, and **REMAND** this case for proceedings consistent with this opinion.

Applicant Details

First Name	**Ninoslav**
Middle Initial	**K**
Last Name	**Dickersin**
Citizenship Status	**U. S. Citizen**
Email Address	**n.dickersin@gmail.com**
Address	**Address** Street **666A Degraw St.** City **Brooklyn** State/Territory **New York** Zip **11217** Country **United States**
Contact Phone Number	**7184153494**

Applicant Education

BA/BS From	**Columbia University**
Date of BA/BS	**May 2020**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 17, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Business Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Harlan Fiske Stone Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Judge, Kathryn
kjudge@law.columbia.edu
212-854-5243

Briffault, Richard
richard.briffault@law.columbia.edu
212-854-2638

Fagen, Leslie G.
lfagen@paulweiss.com
212-373-3231

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ninoslav K. Dickersin
666A Degraw St., Brooklyn NY 11217
(718) 415-3494 | n.dickersin@gmail.com

May 30, 2023

The Honorable Kiyo Matsumoto
United States District Court
Eastern District of New York
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905S
Brooklyn, NY 11201

Dear Judge Matsumoto:

I am a graduate of Columbia Law School, Class of 2023, and am seeking a clerkship in your chambers beginning in 2025. At Columbia Law, I was both a Finalist in and a Co-Director of the Harlan Fiske Stone Honors Moot Court Program, as well as a Harlan Fiske Stone Scholar and a Staff Member of the *Columbia Business Law Review*. I will be starting employment at Sullivan and Cromwell, LLP this September, in New York City.

I am applying to work in your chambers in particular because I am seeking to gain direct experience with the trial process in New York's federal courts. I have lived in New York City my whole life, will begin work here this September, and plan on practicing here for the foreseeable future. Moreover, I am intensely interested in trial advocacy, as my academic experiences show. As such, I hope to be in New York's federal courts often, and believe working in your chambers will be invaluable to my development as a litigator.

Enclosed please find a resume, transcript, and writing sample. Also included are letters of recommendation from Professors Kathryn Judge [(212) 854-5243, kjudge@law.columbia.edu], Leslie Gordon Fagen [lesliegordonfagen@gmail.com], and Richard Briffault [(212) 854-2638, rb34@columbia.edu].

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Ninoslav K. Dickersin

NINOSLAV (NINO) KUCAN DICKERSIN

666A Degraw Street, Brooklyn, NY 11217 • (718) 415-3494 • nkd2118@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D., expected May 2023
Honors: Harlan Fiske Stone Scholar
Activities: Harlan Fiske Stone Moot Court, Finalist, Co-Director
Columbia Business Law Review, Staff Member
Columbia Business and Law Association
First Generation Professionals

Columbia University, Columbia College, New York, NY
B.A., received May 2020
Major: Economics-Political Science
Honors: Dean's List
Pi Sigma Alpha Political Science Honor Society
Activities: Research Assistant to Professor Jon Steinsson, Department of Economics
Columbia Economics Society, Banking Representative
Beta Theta Pi, Treasurer and Philanthropy Chair

EXPERIENCE

Sullivan and Cromwell, LLP, New York, NY
Summer Associate May-July 2022
Represented clients on civil litigation and white-collar criminal defense matters. Produced internal memos concerning legal and factual research relating to auto emissions regulations, mortgage-backed securities due diligence, LIBOR rate-setting, PPP loan fraud, and international arbitration. Met regularly with partners and associates to present and discuss research.

NYC Taxi and Limousine Commission, New York, NY
Student Prosecutor, Hearings Division June-August 2021
Independently represented the Commission in 100+ hearings against taxicab owners, drivers, and bases. Prosecuted a wide range of TLC rule violations, including traffic violations, unlicensed activity, overcharges, and physical/verbal/sexual harassment. Prepared and introduced witness testimony and physical evidence, conducted direct and cross-examination, and made closing arguments. Drafted appeals when appropriate. Determined whether to proceed on summonses, based on sufficiency of evidence.

Brooklyn District Attorney's Office, Brooklyn, NY
Legal Intern, Homicide Division January-April 2019
Assisted attorneys with trial preparation. Ensured pre-trial motions, search warrants, protective orders, and other time-sensitive documents were properly filed with the court. Compiled trial evidence, including crime scene photos, video, witness testimony, and physical evidence.

Methuselah Advisors, New York, NY
Investment Banking Summer Analyst May-August 2018
Provided strategic and financial advice to public and private companies in the media and industrials sectors. Developed materials for board, investor, and management presentations. Met directly with clients, including CEO of TodayTix, for whom we helped raise $73 million in a Series B funding round.

INTERESTS: Group hiking, tennis, chess, classical piano

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Ninoslav Kucan Dickersin

nkd2118@columbia.edu

Student:

Ninoslav Kucan Dickersin

nkd2118@columbia.edu

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COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK

NAME: Ninoslav Kucan Dickersin
SSN#: XXX-XX-5345
SCHOOL: SCHOOL OF LAW

DEGREE(S) AWARDED: DATE AWARDED:
Bachelor of Arts May 20, 2020

MAJOR: ECONOMICS-POLITICAL SCIENCE
Juris Doctor (Doctor of Law) May 17, 2023 PROGRAM: LAW

PROGRAM TITLE: LAW

HARLAN FISKE STONE SCHOLAR-FIRST YEAR ENDING MAY 21
HARLAN FISKE STONE SCHOLAR-SECOND YEAR ENDING MAY 22

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Fall 2020				
LAW	L 6101	CIVIL PROCEDURE	4.00	A-
LAW	L 6105	CONTRACTS	4.00	B+
LAW	L 6113	LEGAL METHODS	1.00	CR
LAW	L 6115	LEGAL PRACTICE WORKSHOP I	2.00	P
LAW	L 6118	TORTS	4.00	B+
Spring 2021				
LAW	L 6108	CRIMINAL LAW	3.00	A-
LAW	L 6116	PROPERTY (FOUNDATION)	4.00	B+
LAW	L 6121	LEGAL PRACTICE WORKSHOP I	1.00	HP
LAW	L 6130	LEGAL METHODS II	1.00	CR
LAW	L 6133	CONSTITUTIONAL LAW	4.00	A-
LAW	L 6679	FOUNDATION YEAR MOOT COUR	0.00	CR
LAW	L 6912	TRANSNATIONAL LITIGATION	3.00	B+
Fall 2021				
LAW	L 6169	LEGISLATION AND REGULATIO	4.00	A-
LAW	L 6220	MASS TORTS	3.00	A+
LAW	L 6241	EVIDENCE	4.00	A-
LAW	L 6635	COLUMBIA BUSINESS LAW REV	0.00	CR
LAW	L 6680	HARLAN F. STONE HON COMPE	0.00	CR
LAW	L 6683	SUPERVISED RESEARCH PAPER	2.00	B+
Spring 2022				
LAW	L 6231	CORPORATIONS	4.00	B+
LAW	L 6354	DRUG PRODUCT LIAB LITIGAT	2.00	A-
LAW	L 6391	REGULATION OF FINANCIAL I	3.00	A
LAW	L 6635	COLUMBIA BUSINESS LAW REV	0.00	CR
LAW	L 6672	MINOR WRITING CREDIT	0.00	CR
LAW	L 6683	SUPERVISED RESEARCH PAPER	1.00	B+
LAW	L 9175	S TRIAL PRACTICE	2.00	A-

SUBJECT	COURSE NUMBER	TITLE	POINTS	GRADE
Fall 2022				
LAW	L 6238	CRIMINAL ADJUDICATION	3.00	B+
LAW	L 6423	SECURITIES REGULATION	3.00	A-
LAW	L 6474	LAW OF THE POLITICAL PROC	3.00	A
LAW	L 6689	SUPERVISED RESEARCH: CRSE	1.00	A
LAW	L 9080	S BLK LTR LAW/WHITE COLLR	2.00	A-
LAW	L 9123	S. ANTI-MONEY LAUNDERING	2.00	A
Spring 2023				
LAW	L 6274	PROFESSIONAL RESPONSIBILI	2.00	A-
LAW	L 6293	ANTITRUST AND TRADE REGUL	3.00	A
LAW	L 6425	FEDERAL COURTS	4.00	B+
LAW	L 6788	STUDENT MOOT CT EXECTIVE	1.00	CR
LAW	L 9172	SEM-ADVANCED TRIAL PRACTI	3.00	A-

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(212) 854-4400

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A, **B**, **C**, **D**, **F** (excellent, good, fair, poor, failing). NOTE: Plus and minus signs and the grades of **P** (pass) and **HP** (high pass) are used in some schools. The grade of **D** is not used in Graduate Nursing, Occupational Therapy, and Physical Therapy.

American Language Program, Center for Psychoanalytic Training and Research, Journalism
P (pass), **F** (failing). Grades of **A**, **B**, **C**, **D**, **P** (pass), **F** (failing) — used for some offerings from the American Language Program Spring 2009 and thereafter.

Architecture
HP (high pass), **P** (pass), **LP** (low pass), **F** (failing), and **A**, **B**, **C**, **D**, **F** — used June 1991 and thereafter **P** (pass), **F** (failing) — used prior to June 1991.

Arts
P (pass), **LP** (low pass), F (fail). **H** (honors) used prior to June 2015.

Business
H (honors), **HP** (high pass), **P1** (pass), **LP** (low pass), **P** (unweighted pass), **F** (failing); plus (+) and minus (-) used for H, HP and P1 grades Summer 2010 and thereafter.

College of Physicians and Surgeons
H (honors), **HP** (high pass), **P** (pass), **F** (failing).

College of Dental Medicine
H (honors), **P** (pass), **F** (failing).

Law
A through **C** [plus (+) and minus (-) with **A** and **B** only], **CR** (credit - equivalent to passing). **F** (failing) is used beginning with the class which entered Fall 1994. Some offerings are graded by **HP** (high pass), **P** (pass), **LP** (low pass), **F** (failing). **W** (withdrawn) signifies that the student was permitted to drop a course, for which he or she had been officially registered, after the close of the Law School's official Change of Program (add/drop) period. It carries no connotation of quality of student performance, nor is it considered in the calculation of academic honors.
E (excellent), **VG** (very good), **G** (good), **P** (pass), **U** (unsatisfactory), **CR** (credit) used from 1970 through the class which entered in Fall 1993.

Any student in the Law School's Juris Doctor program may, at any time, request that he or she be graded on the basis of Credit-Fail. In such event, the student's performance in every offering is graded in accordance with the standards outlined in the school's bulletin, but recorded on the transcript as Credit-Fail. A student electing the Credit-Fail option may revoke it at any time prior to graduation and receive or request a copy of his or her transcript with grades recorded in accordance with the policy outlined in the school bulletin. In all cases, the transcript received or requested by the student shall show, on a cumulative basis, all of the grades of the student presented in single format – i.e., all grades shall be in accordance with those set forth in the school bulletin, or all grades shall be stated as Credit or Fail.

Public Health
A, **B**, **C**, **D**, **F** - used Summer 1985 and thereafter. **H** (honors), **P** (pass), **F** (failing) — used prior to Summer 1985.

Social Work
E (excellent), **VG** (very good), **G** (good), **MP** (minimum pass), **F** (failing).
A though **C** is used beginning with the class which entered Fall 1997. Plus signs used with **B** and **C** only, while minus signs are used with all letter grades. The grade of **P** (pass) is given only for select classes.

OTHER GRADES USED IN THE UNIVERSITY

AB = Excused absence from final examination.

AR = Administrative Referral awarded temporarily if a final grade cannot be determined without additional information.

AU = Audit (auditing division only).

CP = Credit Pending. Assigned in graduate courses which regularly involve research projects extending beyond the end of the term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

F* = Course dropped unofficially.

IN = Work Incomplete.

MU = Make-Up. Student has the privilege of taking a second final examination.

R = For the Business School: Indicates satisfactory completion of courses taken as part of an exchange program and earns academic credit.

R = For Columbia College: The grade given for course taken for no academic credit, or notation given for internship.

R = For the Graduate School of Arts and Sciences: By prior agreement, only a portion of total course work completed. Program determines academic credit.

R = For the School of International and Public Affairs: The grade given for a course taken for no academic credit.

UW = Unofficial Withdrawal.

UW = For the College of Physicians and Surgeons: Indicates significant attempted coursework which the student does not have the opportunity to complete as listed due to required repetition or withdrawal.

W = Withdrew from course.

YC = Year Course. Assigned at the end of the first term of a year course. A single grade for the entire course is given upon completion of the second term. Until such time as a passing or failing grade is assigned, satisfactory progress is implied.

OTHER INFORMATION

NOTE: All students who cross-register into other schools of the University are graded in the **A, B, C, D, F** grading system regardless of the grading system of their own school, except in the schools of Arts (prior to Spring 1993) and in Journalism (prior to Autumn 1992), in which the grades of P (pass) and **F** (failing) were assigned. Notations at the end of a term provide documentation of the type of separation from the University.

% of **A** Effective fall 1996: Transcripts of Columbia College students show the percentage of grades in the **A** (**A+**, **A**, **A-**) range in all classes with at least 12 grades, the mark of **R** excluded. Calculations are taken at two points in time, three weeks after the last final examination of the term and three weeks after the last final of the next term. Once taken, the percentage is final even if grades change or if grades are submitted after the calculation. For additional information about the grading policy of the Faculty of Columbia College, consult the College Bulletin.

KEY TO COURSE LISTINGS

A course listing consists of an area, a capital letter(s) (denotes school bulletin) and the four digit course number (see below).

*The **capital letter** indicates the University school, division, or affiliate offering the course:*

A	Graduate School of Architecture, Planning, and Preservation
B	School of Business
BC	Barnard College
C	Columbia College
D	College of Dental Medicine
E	School of Engineering and Applied Science
F	School of General Studies
G	Graduate School of Arts and Sciences
H	Reid Hall (Paris)
J	Graduate School of Journalism
K	School of Library Services/Continuing Education (effective Fall 2002)
L	School of Law
M	College of Physicians and Surgeons, Institute of Human Nutrition, Program in Occupational Therapy, Program in Physical Therapy, Psychoanalytical Training and Research
N	School of Nursing
O	Other Universities or Affiliates/Auditing
P	School of Public Health
Q	Computer Technology/Applications
R	School of the Arts
S	Summer Session
T	School of Social Work
TA-TZ	Teachers College
U	School of International and Public Affairs
V	Interschool Course
W	Interfaculty Course
Y	Teachers College
Z	American Language Program

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*The **first digit** of the course number indicates the level of the course, as follows:*

0	Course that cannot be credited toward any degree
1	Undergraduate course
3	Undergraduate course, advanced
4	Graduate course open to qualified undergraduates
5	Graduate course open to qualified undergraduates
6	Graduate course
7	Graduate course
8	Graduate course, advanced
9	Graduate research course or seminar

Note: Level Designations Prior to 1961:
1-99 Undergraduate courses
100-299 Lower division graduate courses
300-999 Upper division graduate courses

The term designations are as follows:
X=Autumn Term, Y=Spring Term, S=Summer Term
Notations at the end of a term provide documentation of the type of separation from the University.

THE ABOVE INFORMATION REFLECTS GRADING SYSTEMS IN USE SINCE SPRING 1982. THE CUMULATIVE INDEX, IF SHOWN, DOES NOT REFLECT COURSES TAKEN BEFORE SPRING OF 1982. ALL TRANSCRIPTS ISSUED FROM THIS OFFICE ARE OFFICIAL DOCUMENTS. TRANSCRIPTS ARE PRINTED ON TAMPER-PROOF PAPER, ELIMINATING THE NEED FOR SIGNATURES AND STAMPS ON THE BACK OF ENVELOPES. FOR CERTIFICATION PURPOSES, A REPRODUCED COPY OF THIS RECORD SHALL NOT BE VALID. THE HEAT-SENSITIVE STRIP, LOCATED ON THE BOTTOM EDGE OF THE FACE OF THE TRANSCRIPT, WILL CHANGE FROM BLUE TO CLEAR WHEN HEAT OR PRESSURE IS APPLIED. A BLUE SIGNATURE ALSO ACCOMPANIES THE UNIVERSITY SEAL ON THE FACE OF THE TRANSCRIPT.

May 23, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Nino Dickersin for a clerkship in your chambers. He has a great legal mind and writes beautifully. I think he would be a great addition to your chambers.

I had Nino in two classes. He quickly stood out in my Regulation of Financial Institutions class as a student who asked great questions. He was prepared and thoughtful when on call, but it was his questions that showed me how much he understood the linkages and policy issues at play in a complex area of the law. I was far from surprised when he earned an A on the exam, which I graded blindly. His exam showed both a deep understanding of the material and an impressive ability to organize his thoughts in a cohesive and structured fashion despite the time constraint.

Yet it was the following year, as a student in a seminar on anti-money laundering laws, that he really stood out. I co-taught the course with Anil Kashyap, an economist at Chicago Booth, as a way for both of us to dive deeply in the topic. We stayed just a few steps ahead of the students, and with Nino, there were times he was right there alongside us on the learning curve. He was quick to see some of the bigger picture dynamics shaping, and often undermining, the efficacy of the system, and didn't hesitate to pose hard questions. His response papers were thoughtful and well written. And his final paper was so strong that it could well be publication worthy if he chose to further expand and revise it.

In short, Nino was a wonderful student to have in class and I expect he would be just as much of an asset in chambers. He is smart, creative and able to translate his ideas onto the page. If you have any additional questions, please don't hesitate to reach out. I can be reached via email, kjudge@law.columbia.edu, or on my cell, 206-852-5027.

Best regards,

Kathryn Judge
Harvey J. Goldschmid Professor of Law
and Vice Dean for Intellectual Life
Columbia Law School

COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

May 23, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Ninoslav K. Dickersin

Dear Judge Matsumoto:

I am writing in support of Ninoslav K. Dickersin of the Columbia Law School Class of 2023, who is applying to you for a clerkship. Nino has a strong Law School record and consider-able experience in legal research, writing, and advocacy. He is smart, hard-working, analytical, and seriously committed to advancing his professional skills. I am sure he will make an excellent law clerk.

I know Nino primarily from two classes he took with me – Legislation & Regulation ("Leg-Reg") in Fall 2021, and Law of the Political Process, in the Fall 2022 term. Leg-Reg is a recent addition to Columbia's foundation curriculum. The course focuses on the legislative pro-cess, statutory interpretation, and administrative law. Although in Fall 2021 class was held in-person, due to Covid students were required to wear masks. Nonetheless, in a large class of one hundred students, Nino did well. He asked good questions, and easily demonstrated his ability to apply legal doctrine to contested cases. He stood out for the depth of his engagement with the material, his comfort with legal analysis, and his interest in applying classroom questions to cur-rent social and policy issues. He wrote a very good final exam and received a grade of A- for the course. Nino was, similarly, an excellent participant in the Law of the Political Process, once again displaying a command of doctrine and the ability to ask incisive questions about the issues the course addressed. He wrote a strong final exam and received a grade of A for the course

Nino has achieved an excellent record at Columbia. He was honored as a Harlan Fiske Stone Scholar. His strong brief writing an oral advocacy skills were recognized when he became a finalist in the Harlan Fiske Strone Honors Moot Court competition in his 2L year. He became a co-director of that program in his third year, which involved considerable research and drafting to prepare the case for that year's competitors. Nino gained further writing and editing experi-ence as a staff editor of the Columbia Business Law Review.

Nino has intellectual curiosity, a passion for law, and considerable research, writing and advocacy experience. He is hard-working, bright and articulate, and committed to advancing his professional development. I am very happy to recommend Ninoslav K. Dickersin to you for a clerkship. Please call me at 212-854-2638 if I can be of any further assistance to you in assessing Nino Dickersin's application.

Sincerely,

Richard Briffault
Joseph P. Chamberlain Professor of Legislation

May 23, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Re: Ninoslav K. Dickersen

Dear Judge Matsumoto:

This is a recommendation for Nino Dickersin, a 3L student at Columbia Law School, who is applying for a federal court clerkship.

I am a member of the adjunct faculty of Columbia Law School and Nino was a student this time last year in my trial advocacy course. I have come to know him in and out of the classroom and I feel confident that I can provide a highly reliable recommendation for him.

As for myself, I too have studied the law at Columbia Law School. I served as a law clerk for Judge Jack B. Weinstein in the United States District Court for the Eastern District of New York and spent 42 years at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP where I was a litigation partner, the Chairman of the Litigation Department and a member of the firm's Management Committee. I am also a Fellow of the American College of Trial Lawyers.

Based on these years of experience and, in particular, years working with young law students and lawyers, I believe that Nino would be a superb law clerk. I say that because of his intellect, diligence and integrity. I also admire his people skills; he is a person who one would enjoy working with.

In my trial advocacy course last year, I had 12 students in the classroom. Of the 12, I took specific notice of Nino. The course requires the development of a variety of skills including the gathering of facts, legal research, judgment, expressivity and strategic thinking. Nino showed excellence with respect to all of those skill sets. He does his work with intensity and seriousness and he demonstrated a powerful learning ability.

It is worth mentioning Nino's performance in my class in a closing argument in the full blown jury trial we organized at the end of the semester. The case was a business owner's insurance claim arising out of a factory fire. Nino represented the insurance company. The insurance company claimed in defense that the fire was an arson caused by the owner in cohort with others. Because there was no direct evidence that the fire was intentionally set, the insurance company's case focused largely on a circumstantial set of facts.

It was smart of Nino to show that the business owner's motivation arose from a desire to save his failing business. Nino later told me that he thought desperation was more palatable to the jury than a conventional argument based on greed. He therefore constructed a closing that demonstrated how the business owner explored every possible option to save his business before realizing that none would succeed. He ultimately turned to arson.

Nino's closing argument would have matched the skills of an experienced jury lawyer. He was articulate, sincere and eloquent. He produced a timeline graphic to be the centerpiece of his presentation. He stood in front of the podium and sought to convey certain emotions as part of his presentation. He included metaphor and imagery; one example was, to highlight that the plaintiffs options to save the business were sequentially disappearing, He described them as doors slamming shut, and punctuated that image by loudly clapping his hands together. He gave the presentation with no notes, save what was written on the timeline graphic.

Truly impressive.

Nino's other experiences reflect an excellent background for a law clerk in federal court. He was a Summer Associate at Sullivan and Cromwell between his second and third years in law school. He worked on client representations on civil litigation and white-collar criminal defense matters and performed research on a wide variety of issues subject to litigation in federal court. The law firm gave him an offer of full employment showing that his work was well done. Nino will start at Sullivan and Cromwell this fall.

After Nino's first year in law school, he worked as a Student Prosecutor in the Hearings Division in the New York City Taxi and Limousine Commission. In that role, he was given real responsibility in participating in the representation of the Commission in administrative hearings against taxicab owners and drivers. I am told that, as a prosecutor in handling these cases, he had thirty minutes or less between the assignment of cases and the appearance at the hearing. He had quickly to familiarize himself with the charge and the evidence. He was required to think on his feet and to evaluate the strength of the case. He had to determine whether he had enough evidence to bring charges forward, and orally to present his arguments. Many lawyers practice law in this speedy way. Nino did this work quite well which shows his ability to think and perform on the spot.

His extracurricular activity in Columbia Law School is also significant. He was a finalist in the Harlan Fiske Stone Honors Moot Court competition in his second year. His brief writing and oral advocacy skills in a complex case appear to have excelled those of his peers when placed in direct competition. Beyond that, he had the opportunity to argue a case in front of three federal judges.

Leslie G. Fagen - lfagen@paulweiss.com - 212-373-3231

Nino has continued to dedicate himself to the Moot Court program by working as one of two Co-Directors during his third year. In this position, he was responsible for writing half of the case to be argued by the 2022-2023 competitors. He identified an existing circuit split on a legal issue , created a factual record requiring argument on that issue and wrote a bench memo analyzing the positions of both sides.

In addition to all this work in the Moot Court program, Nino found the time to become a Staff Editor on the Columbia Business Law Review during his second year which allowed him to hone my writing, editing, and citation skills.

Nino was an undergraduate at Columbia College. He majored in Economics-Political Science, a joint major from which he learned economic analysis which have helped him throughout law school, particularly in courses like Regulation of Financial Institutions, Securities Regulation, Antitrust, and other business law related classes. This educational background can be quite important. handling federal court cases.

Outside of school, Nino enjoys playing most every sport, though he is best at tennis and skiing. During the pandemic, he revived his interest in playing the piano, which he did for around seven years as a child. He is an avid chess player, enjoys reading history and politics, and has been studying Croatian, his mother's native language, for nearly a year.

As you could tell, I am quite impressed with Nino. I think he would make a wonderful clerk in your courtroom.

Please do not hesitate to call me if you have any questions.

Sincerely,

Leslie Gordon Fagen

Leslie G. Fagen - lfagen@paulweiss.com - 212-373-3231

Ninoslav K. Dickersin
Writing Sample

The following is a writing sample, produced as part of the applicant's brief for the Finals of the 2021-2022 Harlan Fiske Stone Honors Moot Court Program. It was written and edited entirely by the applicant, with no outside assistance, as required by the competition's rules. It is reproduced exactly as it appeared in the original brief.

The applicant wrote this portion of the brief to answer the following question in the negative: does a bankruptcy judge have authority consistent with Article III of the Constitution to confirm a plan of reorganization that grants a non-consensual release of a non-debtor from state law claims asserted by a third-party?

ARGUMENT

I. THE BANKRUPTCY COURT DID NOT HAVE THE AUTHORITY TO APPROVE THE NON-CONSENSUAL RELEASE OF THE CLAIMS AGAINST HASSELDORF

The bankruptcy court erred in finding it could grant a non-consensual release of the claims against Hasseldorf. R. at 87. Under *Stern v. Marshall*, 564 U.S. 462 (2011), Article III generally bars a bankruptcy court from adjudicating state law claims. Two exceptions exist for claims that: (1) fall under the "public rights" doctrine; and, (2) are integral to the restructuring of the debtor-creditor relationship. *Stern*, 564 U.S. at 497, 499; *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990); *Granfinanciera v. Nordberg*, 492 U.S. 33, 58 (1989). Neither exception applies to this case. Even if this Court adopts an overbroad reading of *Stern* to find that non-consensual third-party releases are permissible when absolutely necessary to a restructuring (as the Third Circuit did in *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d. Cir. 2019)), this release does not meet that standard. Thus, the bankruptcy court's order overstepped its authority and must be overturned.

A. The Bankruptcy Court Unconstitutionally Exceeded Its Jurisdiction in Authorizing the Release of Hasseldorf's Liability Under Article III

Stern established that Article III of the Constitution generally bars adjudication of state law claims by a bankruptcy court. *Stern*, 564 U.S. at 482-487. Article III vests the Judicial Power of the United States in specific courts, the judges of which receive both tenure and salary protections. U.S. Const, art. 3, § 1. Those courts alone have the responsibility and authority to adjudicate claims arising under state law (when federal jurisdiction is present). *Stern*, 564 U.S. at 484 ("when a suit is made of 'the stuff of traditional actions at common law tried by the courts at Westminster in 1789…' the responsibility for deciding that suit rests with Article III judges in Article III courts," citing *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982)

(Rehnquist, J., concurring in judgment)). In contrast, bankruptcy courts (as non-Article III courts which do not enjoy either salary or tenure protection) do not generally have the power to adjudicate such state law claims. *Id*., at 503.

Stern confirmed that limit in the tort law context. *Id*. In the case, the bankruptcy court entered a final judgment on a counterclaim for tortious interference with a gift. *Id.* This was actionable under Texas state law, and the majority took issue with the resultant need for the bankruptcy court to rule on specific state law issues. *Id*., at 498. These included: proof of tortious interference; expectancy of a gift; a reasonable certainty that the expectancy would have been realized but for the interference; and damages, including punitive ones. *Id*. *Stern* concluded that such decisions were outside the authority of the bankruptcy court.

Any application of *Stern* to the resolution of a state law claim by a bankruptcy court should focus on Article III's protection of the separation of powers and the integrity of the Judiciary. *Id*., at 482-484. *Stern* grounded the motivation for limiting the power to adjudicate state law claims to Article III courts in the need to isolate the Judiciary from political influences. *Id*., at 483. By protecting judges' tenure and salaries, the Framers sought to prevent the political branches from threatening the integrity of judicial decision-making. *Id*., at 483-484. Because bankruptcy courts do not enjoy the same kind of protections as Article III judges, their jurisdiction is limited. *Id*., at 485; *Id*., at 514-515 (Breyer, J., dissenting); *Northern Pipeline*, 458 U.S. at 60-61. Furthermore, when considering the exceptions to the general prohibition against adjudication of state law claims by bankruptcy courts, courts should analyze the implications for the separation of powers and the politicization of judicial decision-making.

The bankruptcy court's approval of the Proposed Plan of Reorganization released David Hasseldorf from liability for all claims, by parties involved in this litigation or not, related to Better

Future Housing Co. ("BFH"), his proprietary location-finding program, or reduced property values attributable to BFH's buildings, without those parties' consent. R. at 75, 86. In so far as it provided for that release, the Order confirming the Plan was barred by Article III. Like the counterclaim in *Stern*, the claims against Hasseldorf were state law tort claims, over which the bankruptcy court does not have jurisdiction. R. at 23, 75, 77, 90; *Stern*, 564 U.S. at 470. By releasing Hasseldorf from liability, the bankruptcy court made a final adjudication on those claims, such that the tort claimants would not have an opportunity to have their cases heard in an Article III court. R. at 75, 77. Such an action falls well within the scope of behavior prohibited under *Stern*.

Moreover, the bankruptcy court's action poses a severe risk to the separation of powers, even larger than that in *Stern*. Put simply, the bankruptcy court permitted Hasseldorf, in exchange for cash and his algorithm, to buy his way out of personal liability against the will of the would-be tort claimants. R. at 72, 75, 82. Such a power goes beyond that of any Article III court. Moreover, it subverts the fundamental judicial power to adjudicate the tort claimants' cases from Article III courts to a court which does not have the same protections from the influence of Congress and the Executive. *Stern*, 564 U.S. at 483-484.

Therefore, the bankruptcy court erred in ordering the release of Hasseldorf's liability from claims relating to BFH and his program without the consent of the would-be tort claimants. *Id*. As a non-Article III court without salary or tenure protections, it was generally prohibited from adjudicating state law claims. Because a release from liability necessarily resulted in a final adjudication on that kind of claim, it went beyond the court's power.

B. Adjudication of the Released Claims Were Not a "Public Right" Subject to the Bankruptcy Court's Authority

There are two exceptions to *Stern*'s prohibition on the adjudication of state law claims by a bankruptcy court. The first comes from the "public rights" doctrine. *Stern*, 564 U.S. at 488-495. Under that doctrine, claims arising out of a federal regulatory scheme or of which resolution by an expert Government agency is essential to a limited regulatory objective within that agency's purview may be adjudicated by a non-Article III court. *Id*., at 490. Such claims are distinct from traditional common law actions in fields like tort, contract, and others. *Id*.

In *Stern*, the court rejected the application of the public rights doctrine to the adjudication of a state law tort claim by a bankruptcy court. *Id*., at 493-495. It found that such a claim could be pursued without the involvement of other branches, that it had historically, that it did not dependent on a federal statutory scheme, that the supposed authority was not narrowly tailored to a specific area of law, and that bankruptcy courts did not have a special expertise in evaluating tort claims. *Id*., at 493-494. Critically, though a public right might arise out of bankruptcy courts' power to restructure debtor-creditor relations, that right is distinct from state-created private rights, and cannot be extended to cover the latter. *Northern Pipeline*, 458 U.S., at 71-72 (plurality opinion).

Just as in *Stern*, the tort claims against Hasseldorf are not public rights that either arise out of a federal regulatory scheme or of which resolution by an expert agency is essential to a limited regulatory objective. They arise out of state common law, not a federal statute, and are tort claims, which are regularly and historically adjudicated in Article III and state courts. R. at 23, 75, 77, 90; *Stern*, 564 U.S. at 493. Nor is adjudication tailored to a narrow area of law in which the bankruptcy court has a particular expertise – rather, the kind of non-consensual third-party release presented here, if constitutional, would be a viable portion of a restructuring regardless of the claim the third-party seeks to be released from. Including the tort claims at issue in this case would explode the

public rights doctrine to cover all claims – public and private – and functionally gut Article III's protections. *Stern*, 564 U.S. at 495.

C. The Release Was Not Integral to the Restructuring of Debtor-Creditor Relations

The second exception under *Stern* permits a bankruptcy court's adjudication of state law claims that are integral to the restructuring of the debtor-creditor relationship. *Id*., at 497. A claim is integral to a restructuring only when it either: (1) stems from the bankruptcy itself; or, (2) would necessarily be resolved in the claims-allowance process. *Id*., at 499. Critically, claims are not integral solely because they are related to or have an effect on a bankruptcy case. *Id.* Such claims, as well as any others which do not meet the preceding exclusive two-part test, are outside of bankruptcy courts' authority under Article III. *Id*.

To stem from a bankruptcy, a claim must be established in bankruptcy law. *Id*. In *Stern*, the court found that the tort claim at issue did not meet that standard. *Id*. Although it arose in a bankruptcy proceeding, this was insufficient, because the claim itself was a state tort claim that existed regardless of the proceeding, or bankruptcy law in general. *Id*. In other words, the context in which the action arises is irrelevant: the only consideration is whether or not bankruptcy law establishes the claim. *Id*. Precedent repeatedly affirms that a claim's mere relationship to a bankruptcy proceeding is not a sufficient condition to establish a bankruptcy court's authority to hear the claim. *Id.* ("Congress may not bypass Article III simply because a proceeding may have *some* bearing on a bankruptcy case" (emphasis in original)); *Northern Pipeline*, 458 U.S. at 76 ("Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws"); *Granfinanciera*, 492 U.S. at 60 (mere Congressional "reclassifi[cation of] a preexisting common-law cause of action that was not integrally related to the reformation of debtor-creditor relations" did not establish jurisdiction).

To be necessarily resolved in the claims-allowance process, a claim must have either been brought by a creditor against a debtor, or be required in the adjudication of such a claim. *Stern*, 564 U.S. at 496-497. In *Granfinanciera*, the court found that the absence of a claim filed by the petitioners meant the respondent's fraudulent conveyance action was not part of the claims-allowance process. *Granfinanciera*, 492 U.S. at 58. Moreover, claims which might otherwise fall into the latter category are excluded if the adjudication of the entirety of the claim, and not merely a portion of it, is not needed to resolve a creditor's claim.

In *Stern*, the tort claim was non-integral, though it arose as a counterclaim to a creditor's claim and shared common questions of law and fact. *Stern*, 564 U.S. at 497-498. This was because the court identified additional questions of law and fact (whether tortious interference with a gift was a valid claim under Texas state law; what the elements of that claim were; whether the claimant had factually proven those elements; damages) which the bankruptcy court had needed to answer outside of the connecting creditor's claim. *Id*., at 498. *Stern* makes clear that a creditor does not open the door to consideration of any action involving them by bringing a claim in bankruptcy. *Id*., at 495. Ultimately, a claim is not necessarily resolved in the claims-allowance process based on common questions alone, rather, it must be wholly subsumed in a claim brought by a creditor against a debtor.

Whenever claims brought by non-creditors have been found to be necessarily resolved in the claims-allowance process, they have always piggybacked off creditor claims. In *Katchen*, a voidable preference claim brought by a bankruptcy trustee against a creditor was only subject to the authority of the bankruptcy trustee (the precursor to a bankruptcy court) because its complete resolution was necessary to evaluate the creditor's claim. *Katchen v. Landy*, 382 U.S. 323, 329-330 (1966). The *Katchen* opinion further noted the absence of any additional elements in the

voidable preference claim beyond those necessary to resolve the creditor's claim, arguing further adjudication by an Article III court was unnecessary as a "meaningless gesture." *Id*., at 334. In *Langenkamp*'s parallel reasoning, the creditor's filing of a claim was both sufficient and necessary to make a preferential transfer claim against the creditor integral to the restructuring of the debtor-creditor relationship, because it made the latter part of the claims-allowance process. *Langenkamp*, 498 U.S. at 44-45.

The relevance of the claims-allowance process is sensible in the context of Article III, because it relies on a theory of implied consent to bankruptcy court's adjudication of specific claims. In *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665 (2015), the court made clear that bankruptcy courts, despite being non-Article III courts, may adjudicate claims involving private rights with the parties' consent. *Wellness Int'l Network*, 575 U.S. at 674-678. This is because the Article III right is a personal right subject to waiver. *Id*., at 675, 678. When a creditor brings a proof of claim in a bankruptcy proceeding, they consent to adjudication of that claim by the bankruptcy court; in contrast, a failure to bring a claim retains a right to adjudication in an Article III court. *Langenkamp*, 498 U.S. at 44. Thus, *Stern* and *Katchen* rightly limit the extension of bankruptcy courts' authority to issues necessary to resolve the creditor's claim – anything further has not been consented to. *Stern*, 564 U.S. at 497-498; *Katchen*, 382 U.S. at 329-330. Non-creditors' claims against creditors may only be adjudicated (absent explicit consent by the creditor) when they are necessarily resolved in the adjudication of the creditor's own claim.

The bankruptcy court's release of the claims against Hasseldorf was not integral to the restructuring of the debtor-creditor relationship. First, there is no indication that the claims stemmed from the bankruptcy itself. They are state law tort claims arising out of Hasseldorf's use of his location-finding algorithm. R. at 23, 75, 77, 90. Moreover, that use ended with BFH's most

recent development project, which preceded the bankruptcy proceeding. R. at 4, 34-35. It is irrelevant that the tort claims are of the same kind as those against BFH – those are only permissible as creditor claims, which are justiciable in the bankruptcy court because the tort claimants brought them in of their own accord.

Second, the claims against Hasseldorf are not creditor claims, because he is not a debtor in (or a party to) the bankruptcy. He is the founder and past owner of BFH who has no current role or stake in the company other than his leasing of the location-finding algorithm to them. R. at 69. Thus, the only way the claims against Hasseldorf could be considered integral to the restructuring of the debtor-creditor relationship is if they could piggyback off another creditor's claim.

However, the resolution of the claims against Hasseldorf is not a necessary element of the resolution of any claims by a creditor against a debtor. This is because, though the tort creditors' claims against BFH share common questions with their claims against Hasseldorf, they do not wholly subsume the latter. Like the counterclaim in *Stern*, proving Hasseldorf's liability would require additional conclusions. *Stern*, 564 U.S. at 497-498. Most notably, it would mandate an analysis of his personal role in BFH's business, and whether he shared a willful and malicious intent to destroy landlords' property. R. at 70. Neither of these issues are necessary to proving the tort creditors' claims against BFH. Thus, the release cannot piggyback on those claims.

It is irrelevant that express findings on the novel issues core to Hasseldorf's liability are not required to release the claims against him, because they would otherwise be necessary in an adjudication on the merits of those claims. *Stern* does not distinguish between these two modes of issuing a final judgment, because its core concern is not with whether express findings are made. *Stern*, 564 U.S. at 485. Rather, *Stern* bars the assignation of the power of adjudication itself to a non-Article III court, based solely on the presence of novel, state law claims. *Id*. Therefore, the

mere existence of the additional issues which would be required to prove Hasseldorf's liability in an Article III adjudication on the merits bars resolution of that liability by the Bankruptcy Court.

Moreover, it should be noted that the release at issue flies in the face of the consent theory underlying the *Stern* exception. The tort creditors have explicitly rejected the proposed reorganization plan, solely because of the inclusion of the release. R. at 77. Their filing of claims against BFH cannot be extended to implicitly accept the bankruptcy court's adjudication of claims against Hasseldorf – he is not even a party to the bankruptcy. *Id*. And, core questions that would be at issue in litigation against Hasseldorf remain outside the bankruptcy court's authority. Because the claims subject to release neither stem from the bankruptcy itself, nor are necessarily resolved in the claims-allowance process, they are not integral to the restructuring of the debtor-creditor relationship. As such, they remain outside of the bankruptcy court's authority under the strict protections of Article III.

D. The Bankruptcy Court's Use and Application of the In re Millennium *Standard Was Unconstitutional and Overinclusive*

The Third Circuit has adopted a broader interpretation of what claims are integral to the restructuring of the debtor-creditor relationship in the context of non-consensual third-party releases. *In re Millennium*, 945 F.3d at 135-140. Rather than restrict integral claims to those that stem from the bankruptcy itself or are necessarily resolved in the claims-allowance process, they view these subcategories as permissive examples. *Id*., at 135-136. And, without defining what "integral" might otherwise mean, they extend the exception well beyond precedent to cover non-consensual third-party releases. *Id.*, at 137. Such an interpretation is unfaithful to the narrow provisions in *Stern* and other precedent, does not present a workable standard for determining the

integral nature of claims, flies in the face of Article III's protections for the judicial power, and is not mandatory precedent which this court must follow.

In *In re Millennium*, the Third Circuit found a non-consensual third-party release to be within the authority of the bankruptcy court because it was absolutely necessary to the design of a workable restructuring plan, and was therefore integral to the restructuring of debtor-creditor relations. *Id*. It identified a court's finding of absolute necessity to require strong support from a factual record, and consider factors including: the dependency of any reorganization on the release, the presence of extensive, arm's-length negotiations, and fairness. *Id*., at 137, 139.

To support this broad standard, the Third Circuit read *Stern*'s test and analysis to suggest that "the exercise of 'core' statutory authority by a bankruptcy court can implicate the limits imposed by Article III." *Id.* In other words, the Congressional assignment and description of powers determines whether or not a bankruptcy court may adjudicate a claim. Using this broad reading, the Third Circuit determined that the bankruptcy court's core authority to confirm restructuring plans, combined with the absolute necessity of the release to the plan in *In re Millennium*, established that the release was integral to the restructuring, and therefore within the bankruptcy court's power. *Id*.

Moreover, the Third Circuit presented its best argument as to why claims integral to the restructuring of debtor-creditor relations were not limited to those that either stemmed from the bankruptcy itself or are necessarily resolved in the claims-allowance process. *Id*., at 138-139. Examining the phrasing and structure of the *Stern* opinion, it determined that, because *Stern* noted that the claims-allowance process could make claims integral to restructuring, that the latter was a broader category which included other aspects of bankruptcy. *Id.*, at 138. And, reading into two sentences in *Granfinanciera*, it concluded that, because the opinion first analyzed whether a claim

was brought into the claims-allowance process and subsequently noted the claim was not integral to restructuring, the latter must be something more. *Id*., at 138-139.

The *In re Millennium* court was correct to note that the "integral to the restructuring language [is not] limited to the claims-allowance process." *Id*., at 138 (internal quotation marks omitted). It was incorrect to assume that that language went beyond the other part of the test: that the claim stems from the bankruptcy itself. *Stern*, 564 U.S. at 499. First, the Third Circuit's structural analysis of the *Stern* opinion in no way indicates that integral claims exist outside of those captured within the two-part *Stern* test. Yes, claims integral to a restructuring are broader than those that arise in the claims-allowance process, because they also include claims that stem from the bankruptcy itself. Neither the language used in *Stern* nor in *Granfinanciera* indicates anything more than this, not even implicitly. *Stern*, 564 U.S. at 497; *Granfinanciera*, 492 U.S. at 58.

Second, no precedent suggests there might be claims integral to the restructuring of the debtor-creditor relationship outside of those that stem from the bankruptcy or are necessarily resolved in the claims-allowance process. *Stern* disqualified the Petitioner's counterclaim from the bankruptcy court's authority, irrespective of the facts that it was compulsory to a creditor's claim, and that it implicated the value of the estate. *Stern*, 564 U.S. at 497-498. *Northern Pipeline* and *Granfinanciera* also rejected the adjudication of claims that affected the value of the bankruptcy estate. *Northern Pipeline*, 458 U.S. at 56; *Granfinanciera*, 492 U.S. at 36-37, 56. In none of these cases did the Supreme Court identify any reason beyond *Stern*'s two-part test as to why the claims at issue were non-integral. If claims that did not fall within the two-part test might yet be considered integral, as *In re Millennium* suggests, one would expect some consideration of other factors in precedent.

Moreover, in every case where a claim has been found to be integral, the claim either stemmed from the bankruptcy itself or was necessarily resolved in the claims-allowance process. *Katchen*, 382 U.S at 329-330; *Langenkamp*, 498 U.S. at 44-45; *Stern*, 564 U.S. 498-499 ("in both *Katchen* and *Langenkamp*…the trustee bringing the preference action was asserting a right of recovery created by federal bankruptcy law). In other words, every precedent indicates that it is sufficient to analyze the two-part test to determine whether a claim is integral to a restructuring. Additionally, no precedent confirms the assumption that plan-confirmation proceedings are integral to a restructuring. *In re Millennium*, 945 F.3d at 137. Beyond *Stern*'s two-part test, no court may extend a bankruptcy court's authority under the "integral to the restructuring" banner.

Third, precedent clearly rejects the Third Circuit's argument that a designation of "core" statutory authority by Congress to bankruptcy courts could establish an exception to Article III's vesting of the judicial power. *In re Millennium*, 945 F.3d at 137. In *Granfinanciera*, the court found that the fraudulent conveyance action at issue had been designated as a "core proceeding triable by bankruptcy judges" in the 1984 Amendments to the Bankruptcy Reform Act of 1978. *Granfinanciera*, 492 U.S. at 60-61. But, because the action was preexisting under common law, it was inherently not integral to the reformation of debtor-creditor relations. *Id*. Congress' reclassification of the action was a purely taxonomic change that did not alter the Constitutional limits on bankruptcy courts' authority. *Id*.

Even if the Third Circuit's broad reading of *Stern*'s "integral to the restructuring" language is permissible under precedent, it presents an unworkable standard which should not and need not be adopted by this Court. *In re Millennium* does not present an alternative definition for which claims can be considered "integral." Rather, it transforms precedent from a delineation of the boundaries of a precise test to a set of non-exhaustive examples of what is and is not integral. *In*

re Millennium, 945 F.3d at 135-136. It thus generates substantial ambiguity and presents lower courts with little guidance as to how to proceed.

That ambiguity is particularly dangerous because the standard of review to overturn the factual findings within an order of a bankruptcy court is clear error. *Sinclair Oil Corp. v. Jones*, 31 F.3d 659, 661 (8th Cir. 1994). Thus, reviewing courts have limited control over determinations such as whether a release was absolutely necessary to a restructuring, or whether extensive, arms-length negotiations were present. In fact, the *In re Millennium* decision relied heavily on the bankruptcy court's findings respecting those two concerns. *In re Millennium*, 945 F.3d at 137. Punting the definition of integral claims to lower courts without clear guidelines risks inconsistent verdicts and introduces additional uncertainty into both bankruptcy litigation and plan-confirmation negotiations.

At best, *In re Millennium* establishes that any claim is integral to a restructuring if and only if restructuring is impossible absent adjudication of the claim. *Id*., at 137. But, it leaves that highly subjective determination to the discretion of the bankruptcy court. *Id*., at 137, 139. In doing so, it introduces confusion into bankruptcy proceedings and creates opportunities for strategic negotiations that hurt the bargaining process.

Centering bankruptcy courts' authority to adjudicate claims on the parties' ability to negotiate terms gives third-parties the power to skirt the judicial system and win release from liability without the would-be claimants' consent. While *In re Millennium* claims to require "exacting standards" for such releases, it functionally asks for little more than a finding by the bankruptcy court that the third-parties would not be willing to make necessary contributions without the releases. *Id*., at 137, 139. Conditioning parties' liability on their intransigence and ability to protract negotiations increases the complexity and reduces the efficiency of bankruptcy

negotiations, creates an avenue to effectively exclude would-be claimants from a seat at the bargaining table, and presents a clear fairness concern. *Id*., at 129-132.

This problem is most salient when one considers that, under the *In re Millennium* standard, a third-party may win non-consensual release of any claim against it as long as it can be conditioned on a contribution that is necessary to a restructuring plan. Worse yet, this seems to hold true even if the third-party has no connection to the bankruptcy proceeding; at least, *In re Millennium* does not provide a standard for excluding third-parties who are not adequately connected to the underlying bankruptcy proceeding. Claimants beware: under *In re Millennium*, if you enter a bankruptcy proceeding as a creditor, you may lose any other claims you have against any third-party if they can cough up the funds needed to craft a viable restructuring plan in that proceeding (and refuse to otherwise provide them).

Beyond the unworkability of the Third Circuit's overbroad standard, it also runs aground on Article III's strict protection of the judicial power. It grants bankruptcy courts the power to adjudicate state common-law claims, which precedent specifically identifies as a separation of powers issue. *Stern*, 564 U.S. at 484; *Northern Pipeline*, 458 U.S. at 71. Unlike *Stern*'s two-part test, it does not restrict adjudication of non-bankruptcy claims to those in which a creditor opens the door and implicitly consents through their own action via the claims-allowance process. *Stern*, 564 U.S. at 499. In fact, the release at issue in *In re Millennium* was approved with no identification of any implicit consent, through the claims-allowance process or otherwise. *In re Millennium*, 945 F.3d at 132. By permitting the adjudication of common-law claims, the *In re Millennium* standard risks subjecting judgment to the political influences that Article III was designed to restrict.

Even if this Court adopts the exception in *In re Millennium* to permit a bankruptcy court to adjudicate any claim it deems absolutely necessary to a viable restructuring, the release at issue

does not meet that standard. While it did result in a viable restructuring plan, the bankruptcy court incorrectly concluded it was the only means to achieve a reorganization. R. at 87-88. Moreover, there were no extensive, arm's-length negotiations, and the release was not fair to all parties, both of which the *In re Millennium* decision required. *In re Millennium*, 945 F.3d at 137, 139.

The release was not the only path to a viable reorganization. The bankruptcy court made two claims as to why it was: that the use of Hasseldorf's algorithm, acquired in exchange for the release, was necessary to the profitability of the restructured firm, and that Hasseldorf's cash contribution provided all the funds to pay a portion of Classes 2 and 3's claims against the Debtor. R. at 87-88. But, the record does not support these conclusions.

The bankruptcy court's reliance on Hasseldorf's claim that he would gut the restructuring plan absent a release, without making any efforts to verify that reality, was clear error. Hasseldorf claimed he would not otherwise allow the firm to use the algorithm, but his threat was not credible. R. at 23-25. His testimony indicates that, absent a release, he would be strapped for cash and need to sell his algorithm to pay for litigation. *Id*. BFH is the only company that has ever used the algorithm, and in fact depends on it to conduct its business. R. at 15, 19. Moreover, Hasseldorf's testimony did not identify any other potential buyers specifically. Nor did it indicate why the product could not be licensed to multiple companies, one of which could be BFH. Thus, a reorganized BFH represents the best (and possibly only) opportunity for Hasseldorf to monetize his program. R. at 25. Hasseldorf's professed need for finances should the tort claims be brought against him suggests an increased desire to license the program to BFH, not the opposite. At best, the release improves the probability of a profitable, restructured firm, which in no way establishes the absolute necessity required under *In re Millennium*.

The bankruptcy court's conclusion that only Hasseldorf's cash contributions provided funds to pay a portion of Classes 2 and 3's claims against the Debtor was also clear error. R. at 77-78. The reorganization plan also provided that funds from the auction exceeding the Class 1 claims would go to Classes 2 and 3. R. at 81. And, particular Classes' receipt of funds is not absolutely necessary to a reorganization. Indeed, the approved plan provided no funds to Class 4. R. at 82. Therefore, there was a viable restructuring plan absent the cash contributions.

Furthermore, the bankruptcy court's findings on these two claims reflect a failure to appreciate the risk of abusive negotiations and gamesmanship that comes with the power to issue non-consensual third-party releases. As the Third Circuit noted in *In re Millennium*, absent a requirement that the necessity of such releases be supported by specific factual findings based on the record, reorganization financers may be able to acquire releases simply by demanding them. *In re Millennium*, 945 F.3d at 139. In this case, through the provision of his algorithm and cash contributions, Hasseldorf is financing BFH's restructuring. And yet, the bankruptcy court relied solely on his word in justifying the release of claims against him. However, Hasseldorf's obvious and admitted interest in eliminating his potential liability makes his word suspect, and the bankruptcy court should have found additional support for the release.

Nor did the record show that the required extensive, arm's-length, and fair negotiations generated the release provisions. A finding of that fact, absent here, was critical to the decision in *In re Millennium*. R. at 87-88; *In re Millennium*, 945 F.3d at 130-132, 137, 141. It lent essential support to the determination that the release was actually necessary to the reorganization, and not merely purported to be. *Id*., at 137, 141. In the present case, no indication of such negotiations exists. The absence of such a finding is sufficient to reject the bankruptcy court's use of the non-consensual third-party release. *Id*., at 139.

Moreover, the record indicates that negotiations were neither fair nor made at arm's-length, because of both the bargaining power Hasseldorf wielded, and the lack of value of the released claims to many creditors. Hasseldorf's control of the algorithm gave him the unilateral power to prevent restructuring. R. at 87. This forced the creditors to meet his demands. Fortunately for all except the tort creditors, he only wanted a release from claims against him. R. at 82. Unlike the creditors in *In re Millennium* who agreed to the release, Classes 1, 2 and 4 had no potential recovery from such claims. *In re Millennium*, 945 F.3d at 130. Unsurprisingly, they were happy to bargain them away in exchange for tangible gains. Such a one-sided exchange cannot be characterized as fair or arm's-length.

Thus, the bankruptcy court's order went well beyond its adjudicatory authority as limited by Article III. The claims against Hasseldorf were state, common-law actions which the bankruptcy court was prohibited from resolving outside of specific exceptions. Those actions did not fall under either the "public rights" or the "integral to the restructuring" exceptions, because of the nature of the claims and their lack of a sufficient relationship to any claim at issue in the bankruptcy proceeding. Even under the Third Circuit's broad reading of the "integral to the restructuring" exception, which is neither mandatory precedent nor acceptable under the *Stern* line of cases, this release is barred. The bankruptcy court did not adequately establish that the release of the claims against Hasseldorf were absolutely necessary to a viable restructuring. Absent a specific and thorough finding (grounded in a factual record) of that reality, it had no authority to order the release under the standard established in *In re Millennium*. *Id*., at 139.

Applicant Details

First Name	**Lily**
Middle Initial	**M**
Last Name	**Fagin**
Citizenship Status	**U. S. Citizen**
Email Address	**lily.fagin@law.nyu.edu**
Address	**Address** Street **123 Waverly Place, #1E** City **New York** State/Territory **New York** Zip **10011** Country **United States**
Contact Phone Number	**5166409658**

Applicant Education

BA/BS From	**Dartmouth College**
Date of BA/BS	**June 2016**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 20, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change, Executive Editor**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Estlund, Cynthia
cynthia.estlund@nyu.edu
212-998-6184
Archer, Deborah
deborah.archer@nyu.edu
212-998-6528
Francis, Daniel
daniel.francis@law.nyu.edu
212-998-6425

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Lily Fagin
123 Waverly Place
New York, NY 10011
Lily.fagin@law.nyu.edu
(516) 640-9658

May 19, 2023

The Honorable Kiyo Matsumoto
U.S. District Court for the Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Matsumoto,

I am a graduate of New York University School of Law and write to apply for a clerkship in your chambers during the 2025-26 term or any subsequent term. Beginning in September, I will be an associate at Skadden, Arps, Slate, Meagher & Flom in New York.

Please find my resume, writing sample, and transcript attached. My unedited writing sample is a memorandum that I prepared as part of my work in the Civil Rights Clinic. My application also includes letters of recommendation from Professors Daniel Francis, Cynthia Estlund, and Deborah Archer. I took Professor Francis's antitrust course in fall 2022. I took Professor Estlund's property course in fall 2022 and her seminar, *Regulating Work Beyond Employment*, in spring 2021. In the seminar I authored a paper exploring extending the statutory labor exemption to federal antitrust laws to include coordination among non-employee gig workers. Professor Archer supervised my work in the Civil Rights Clinic from fall 2021to fall 2022. She is the President of the American Civil Liberties Union.

Daniel Francis | NYU School of Law | daniel.francis@law.nyu.edu | (212) 998-6425

Cynthia Estlund | NYU School of Law | cynthia.estlund@nyu.edu | (212) 998-6184

Deborah Archer | NYU School of Law | deborah.archer@nyu.edu | (212) 998-6473

Through my work in the Civil Rights Clinic, at Skadden, and at the legal nonprofits Centro de los Derechos del Migrante and Her Justice, I have gained substantial exposure to a range of processes relevant to litigation. I am deeply enthusiastic about the prospect of clerking for you. I would be delighted to answer any questions you may have about my application. Thank you for your consideration.

Respectfully,

/s/
Lily Fagin

LILY MADELINE FAGIN

123 Waverly Place #1E New York, NY 10011 | (516) 640 – 9658 | Lily.fagin@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2023
Unofficial GPA: 3.70
Honors: Robert McKay Scholar – top 25% based on cumulative average after four semesters
Review of Law and Social Change, Executive Editor
Activities: Teaching Assistant to Professor Maggie Blackhawk, Constitutional Law, Spring 2023
Teaching Assistant to Professor Daniel Capra, Evidence, Fall 2022
Law Students for Economic Justice, Board Member, April 2021 – April 2022
Research Assistant to Professor Helen Hershkoff, Civil Procedure, Summer 2021

DARTMOUTH COLLEGE, Hanover, NH
B.A. in History, *cum laude*, June 2016
Honors: James O. Freedman Presidential Scholar – *selected for paid research assistantship*
Activities: Student and Presidential Committee on Sexual Assault, Policy Chair
Outing Club, First-Year Trips Student Leader
Study Abroad: Universitat de Barcelona, Spanish Language Study Abroad Program, Spain, winter 2014

EXPERIENCE

SKADDEN ARPS SLATE MEAGER & FLOM, New York, NY
Associate, beginning September 2023; *Summer Associate,* May 2022 – July 2022
Researched issues and wrote memoranda related to ongoing securities, antitrust, and mass tort litigation, as well as pro bono initiatives. Assisted with deposition preparation. Returning to join the mass torts practice group.

CIVIL RIGHTS CLINIC, New York, NY
Student Advocate, September 2021 – December 2023
Initiate nationwide impact litigation and policy projects related to racial and reproductive justice. Clinic was awarded the NAACP foot soldier award for litigation and advocacy. Represented employment discrimination plaintiff in a mediation before the New York City Commission on Human Rights.

CENTRO DE LOS DERECHOS DEL MIGRANTE, Mexico City
Summer Law Clerk, June 2021 – August 2021
Researched issues and wrote memoranda related to ongoing litigation on behalf of migrant workers in the United States. Conducted bilingual intakes and investigative interviews with workers to assess potential legal violations. Researched available remedies and assisted workers in preparing complaints to administrative agencies.

HER JUSTICE, New York, NY
Legal Assistant, April 2019 – June 2020
Provided wide range of legal and administrative support in the areas of family, divorce, and immigration law. Conducted bilingual intakes and advised clients on legal processes and available resources.

SUCCESS ACADEMY CHARTER SCHOOLS, Brooklyn, NY
Humanities Lead Teacher, July 2016 – June 2018
Taught History and English to students from traditionally underserved neighborhoods.

SOUTHWEST CENTER FOR LAW AND POLICY, Tucson, AZ
Dartmouth Partners in Community Service Fellow, June 2015 – September 2015
Designed programs, wrote policy briefs, and drafted protocol related to sexual assault in Indian Country. .

BRIDGEWATER ASSOCIATES, Westport, CT
Investment Associate Intern, January 2015 – March 2015
Participated in Socratic-style class and conducted independent research on macroeconomic themes.

LANGUAGES

Fluent Spanish speaker, writer, reader trained in best practices in legal interpretation.

Name: **Lily M Fagin**
Print Date: **06/01/2023**
Student ID: **N11012580**
Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2020

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Torts	LAW-LW 11275	4.0	B
Instructor: Eleanor M Fox			
Procedure	LAW-LW 11650	5.0	B
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	IP
Topic: Tax, Race, and Class			
Instructor: Daniel N Shaviro			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2021

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A-
Instructor: Trevor W Morrison			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: David Simson			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Avani Mehta Sood			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Daniel N Shaviro			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer			
Johanna E Miller			
Civil Rights Clinic	LAW-LW 10627	3.0	A-
Instructor: Deborah Archer			
Johanna E Miller			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Research Assistant	LAW-LW 12589	1.0	CR
Summer 2021 Research Assistant			
Instructor: Helen Hershkoff			
Class Actions Seminar	LAW-LW 12721	2.0	A-
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	A-
Instructor: Samuel Issacharoff			
Arthur R Miller			
Civil Rights Clinic Seminar	LAW-LW 10559	4.0	A
Instructor: Deborah Archer			
Johanna E Miller			
Civil Rights Clinic	LAW-LW 10627	3.0	A-
Instructor: Deborah Archer			
Johanna E Miller			
Regulating Work Beyond Employment Seminar	LAW-LW 12513	2.0	A
Instructor: Cynthia L Estlund			
Mark D. Schneider			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

McKay Scholar-top 25% of students in the class after four semesters

Fall 2022

School of Law
Juris Doctor
Major: Law

Antitrust Law	LAW-LW 11164	4.0	A
Instructor: Daniel S Francis			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Daniel J Capra			
Property	LAW-LW 11783	4.0	A
Instructor: Cynthia L Estlund			
Advanced Civil Rights Clinic	LAW-LW 12805	2.0	A
Instructor: Joseph Schottenfeld			
Advanced Civil Rights Clinic Seminar	LAW-LW 12806	1.0	A
Instructor: Joseph Schottenfeld			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	70.0	70.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post Conviction	LAW-LW 10104	4.0	A-
Instructor: Emma M Kaufman			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Joseph E Neuhaus			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Maggie Blackhawk			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A
Instructor: Helen Hershkoff			
Review of Law & Social Change	LAW-LW 11928	2.0	CR

	AHRS	EHRS
Current	14.0	14.0
Cumulative	84.0	84.0

Staff Editor - Review of Law & Social Change 2021-2022
Executive Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

New York University
A private university in the public service

Professor Cynthia L. Estlund
Catherine A. Rein Professor of Law

40 Washington Square South
Vanderbilt Hall, Room 403B
New York, NY 10012-1099
Telephone: (212) 998-6184
Facsimile: (212) 995-4590
E-mail: cynthia.estlund@nyu.edu

March 23, 2023

RE: Lily Fagin

Dear Jude:

I am writing to strongly recommend Lily Fagin, NYU School of Law class of 2023, for a clerkship in your chambers. Lily is a very talented young lawyer and legal writer and analyst. It took a semester in law school for Lily to hit her academic stride, but since then she has racked up a stellar set of grades in a wide variety of courses, including one of the top grades in my large Property class last fall.

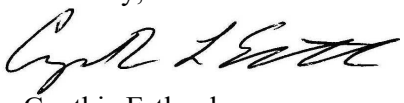
I first got to know Lily in my seminar on Regulating Work Beyond Employment last spring. She was invariably well-prepared and thoughtful in her interventions. Her writing is fluid and clear (which she might owe partly to her two journalist parents!). She showed off her writing skills in several short reaction papers and especially in her final paper, which was one of the very best in the class.

A major theme in the seminar was the clash between antitrust law and collective action among workers classified as independent contractors, and the surprisingly gray outer boundaries of the statutory labor exemption from the Sherman Act. The issue is complicated by the many extant state and federal law tests for the line between "employee" and "independent contractor," and by the legal chronology: The statutory basis for the "statutory labor exemption" from antitrust law predated the 1935 enactment of the NLRA (which covers "employees"); the Supreme Court decision recognizing the exemption came several years after the NLRA; and then the Taft-Hartley amendments that expressly excluded "independent contractors" from the NLRA came several years after that. The Supreme Court has made only a handful of pronouncements on the application of the labor exemption to independent workers, none of which is very illuminating beyond its particular facts.
In her seminar paper, Lily grabbed ahold of a late-breaking First Circuit decision holding that a strike by an association of Puerto Rican jockeys was within the labor exemption whether or not the jockeys were independent contractors. She then applied the court's analysis to the New York City-based "Los Deliveristas," an advocacy group for app-based food delivery workers. Recognizing, however, that the court's analysis (as well as the Supreme Court jurisprudence) was quite underdeveloped, Lily sought to outline a workable and equitable test for the labor exemption that respected the policies underlying both the antitrust laws and

the labor exemption. It is one of the most thoughtful and interesting things I have read in this space.

Lily is also a delightful person—lively, curious, and engaging. She must have been a fabulous teacher (for two years in Brooklyn before law school). She is sure to be a positive presence in any professional setting, including the judicial chambers. All in all, I am confident that you would find Lily to be an excellent law clerk—reliable, energetic, collegial, and professional.

Sincerely,



Cynthia Estlund

NYU | LAW

DEBORAH N. ARCHER
Associate Dean & Director of Clinical and Advocacy Programs
Professor of Clinical Law
Co-Faculty Director, Center on Race, Inequality, and the Law

NYU School of Law
245 Sullivan Street, 610
New York, New York 10012

P: 212 998 6528
F: 212 995 4031

deborah.archer@nyu.edu

May 19, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

RE: Lily Fagin

Dear Judge Matsumoto:

It is my pleasure to recommend Lily Fagin for a judicial clerkship. I am a member of the faculty at NYU School of Law and President of the ACLU. Last year, I had the pleasure of working with Lily in the Civil Rights Clinic I teach. Lily is an excellent legal writer, a thorough researcher, and an enthusiastic team member. I am confident she would be an invaluable addition to your chambers.

The Civil Rights Clinic provides students with the opportunity to work on a wide range of civil rights and social justice matters through direct client representation, appellate advocacy, and the development of advocacy campaigns. Selection is highly competitive, and Lily was one of only eight students selected for the Clinic from a pool of over one hundred applicants. From the first class, Lily has been a star. Her work has been creative, and she has demonstrated compassion and profound empathy for her clients and their needs. She has spent time working with community members to fight discriminatory housing, drafted an amicus brief to the United States Supreme Court, and did cutting-edge research and advocacy on a novel reproductive rights issue.

In all of her work, Lily explored different litigation and policy options, conducting extensive legal research into different potential claims and strategizing with litigation partners and other students to determine the best course of action. This process involved not only diligent attention to detail but also creativity and teamwork. Lily was enthusiastic about conducting research to determine which advocacy options were the most promising. With little initial information, Lily and her colleagues in the clinic developed a sophisticated understanding of the economic and political realities on the ground. I was especially impressed by Lily's diligence in developing a mastery of the facts. Months later, when drafting advocacy letters and pleadings, Lily deftly incorporated relevant details with the legal framework.

Lily is a talented legal researcher and writer. In her research, she identifies the most important authorities and can succinctly explain how they fit together by adducing underlying principles. One case she worked on involved bringing a false advertising challenge in a novel factual context. Lily quickly developed expertise in the relevant consumer protection law, identifying the most salient barriers to a finding of liability and brainstorming creative ways to distinguish unfavorable precedents.

Lily also co-led the drafting of an amicus brief the clinic filed on behalf of the National Black Law Students' Association in Students for Fair Admissions v. President and Fellows of Harvard College and Students for Fair Admissions v. University of North Carolina. Lily's writing is clear, concise, and always includes appropriate support for her arguments. Because she is also responsible for citations in her role as an Executive Editor of the Review of Law and Social Change, she was always happy to bring her attention to detail and blue-booking skills to the clinic's work.

Lily is a great person to work with not only because of the skills detailed above but also because of her friendly and collaborative approach to her work. Lily developed strong professional and personal relationships with the other students in the clinic. She is a lovely person who cares about her peers and coworkers. She was always thoughtful and respectful of other people's time and generous with her own. She has a good attitude and is open to constructive criticism. I believe she would be a great addition to your team. If I can provide any further information, please let me know.

Sincerely,

Deborah N. Archer

NYU | LAW

DANIEL FRANCIS
Assistant Professor of Law

NYU School of Law
40 Washington Square Park South
New York, NY 10012

daniel.francis@law.nyu.edu

May 15, 2023

Dear Judge,

I write, delightedly, to recommend Lily Fagin to you for a judicial clerkship. She is a genuine star: brilliant, incisive, thoughtful, articulate, and collegial. I can't recommend her highly enough, and I would hire her unhesitatingly for a high-stakes entry-level legal position of virtually any kind. She will be a tremendous asset to any chambers lucky enough to have her on the team.

My name is Daniel Francis. I am an Assistant Professor of Law at NYU Law, where I teach antitrust. (I previously served for three years in the Federal Trade Commission, and practiced antitrust for a decade beforehand.) Lily was one of my students this year. She was a very active participant in class and a frequent visitor to office hours, where we discussed an array of substantive legal issues and research topics. She also put in a terrific performance in the very competitive end-of-course examination. I have therefore had the opportunity to get to know her and her work very well.

Lily is an exceptionally strong student, as her remarkable run of top grades indicates and as my own experience confirms. Her mastery of antitrust was genuinely remarkable. Very simply, she was a stand-out student—one of the strongest three or four—in a very competitive classroom full of gifted folks, many of whom had some previous familiarity with the subject matter. In particular, the race for an "A" grade was *exceptionally* competitive: but Lily navigated complex precedent, microeconomic analysis, and tangled facts with remarkable aplomb and accuracy, both in the exam and throughout the course. Her final grade was an appropriate reward for a semester of terrifically impressive work. It was doubly impressive to have accomplished all this while also obtaining a perfect run of A grades in *all* her classes last semester.

In addition, Lily's classroom participation was, without qualification, the best of any student in our very strong class. Her interventions were accurate and concise, showing great understanding of the substance of antitrust doctrine and a strong grasp of antitrust's frontiers and tensions—including their rich practical and philosophical stakes. Moreover, she interacted confidently, respectfully, and effectively with her peers (including those with very different views) and consistently served as a major driver of classroom discussion, frequently spotting and opening up topics and issues in a manner that invited her colleagues to engage. In sum, she was a model participant in our classroom community: enriching the discussions immeasurably, and engaging gladly and perceptively with even the most fiendish problems and puzzles.

Nor was her great participation confined to whole-class discussion. In addition to traditional lecture, our class involved problem-solving work in small groups. During these exercises I consistently observed Lily taking an active but sensitive role with her peers, encouraging others to share their own views and facilitating a great and productive experience for those around her.

Lily's substantive lawyering skills are excellent. As her superb grades, strong academic profile, law-review editorship, and competitive Teaching / Research Assistant positions all suggest—and as my own experience confirms—she is terrific at distilling complex issues down to their components, framing the key arguments effectively and efficiently, and expressing a bottom-line view that is persuasive and nuanced.

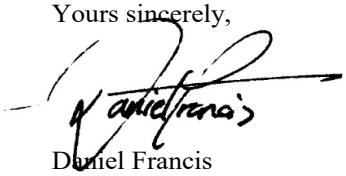
I would gladly trust her to puzzle her way through a complex analytical problem, a messy fact record, or an enigmatic line of authorities. In class, in office hours, and in her final exam, Lily demonstrated a really

strong grasp of the fabric of antitrust doctrine, and showed remarkable confidence and clarity in navigating the often-tangled highways and byways of an antitrust legal analysis.

Finally, I'd like to say a word in acknowledgment and celebration of Lily's practice of citizenship and her orientation toward service. She is a terrifically dedicated member of our community, investing strongly in clinical service, and continuing a rich and distinguished record of service that began long before she came to law school. From her work supporting migrant rights in Mexico to her service helping support first responders in Native American communities, Lily has been contributing where it counts for many years. I have not the least doubt that she will be a superb example of our professional community, and a glowing example for those who follow her.

I hope it's clear that I endorse Lily's application in the strongest possible terms! I wish you the very good fortune of working with her. Needless to say, please don't hesitate to let me know if I can answer any additional questions, or otherwise assist you as you consider Lily's application. It would be my pleasure to do so. You can reach me by phone on 202-538-1775 or by email at *daniel.francis@law.nyu.edu* at any time.

Yours sincerely,



Daniel Francis

TO: [redacted]
FROM: Lily Fagin, APR Team, NYU Civil Rights Clinic
DATE: November 29, 2021
RE: Federal Court Taxpayer Standing

Question Presented: Do taxpayers have standing to challenge federal and/or state government funds being used to support Crisis Pregnancy Centers in federal court?

Short Answer

Probably yes, but with significant limitations. In general, Article III's "case and controversy" requirement bars individuals whose only injury is by virtue of their status as taxpayers from suing in federal court. *Frothingham v. Mellon (decided with Massachusetts v. Mellon)* 262 U.S. 447 (1923); *see* U.S. Const. art. III § 2, cl. 1. The Supreme Court carved out an exception to this prohibition, however, by granting standing to taxpayers alleging violations of the First Amendment's religion clauses in *Flast v. Cohen*, 392 U.S. 83 (1968). If Crisis Pregnancy Centers (CPCs) receive government funding and are promoting religious beliefs, aggrieved taxpayers could allege violations of the Establishment Clause. This strategy would only apply to religious CPCs who receive Title X, TANF, or state funds. No one has challenged funding for CPCs as violating the Establishment Clause yet.[1]

Long Answer

I. Federal Taxpayer Standing Doctrine

A. General Rule Against Taxpayer Standing

[1] Scholars have discussed the potential for First Amendment violations in the context of judges referring pregnant persons seeking an abortion to consult with CPCs per states' informed consent statutes. *See* Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7:2 J. OF CONSTITUTIONAL L. 473 (2004).

In *Frothingham*, *supra*, a taxpayer plaintiff alleged that a federal statute, the Maternity Act of 1921 would, in effect, "take her property, under the guise of taxation, without due process of law." 262 U.S. at 480. The Act appropriated federal money to reduce maternal and infant mortality, but only to those states who chose to participate and accept certain conditions. *See id.* Frothingham was a Massachusetts taxpayer with no personal connection to the issue besides that her tax dollars would be supporting the Act. *See id.* at 486-87. Her challenge was consolidated with that of Massachusetts, which attacked the Act as unduly invasive of its sovereign powers and violative of the Tenth Amendment. *Id.* at 479-80. Until *Frothingham*, the Court had never addressed whether a taxpayer could sue the federal government for an allegedly unconstitutional use of her tax dollars. *See id.* at 486. Earlier decisions had recognized a taxpayer's right to sue a municipality for the same because, in that scenario, their interest is "direct and immediate" given the smaller number of taxpayers affected. *See id.* at 486-87 (citing *Crampton v. Zabriskie*, 101 US 601 (1879)). But the relationship of United States taxpayer to the federal government is "very different":

> His interest in the moneys of the treasury—partly realized from taxation and partly from other sources—is shared with millions of others, is comparatively minute and indeterminable, and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity.

Id. at 487. Given the vast number of taxpayers affected by a federal statute and the indeterminacy of their implicated interests, the Court held that "[t]he administration of any statute….is essentially a matter of public and not individual concern." *Id.* The Court cautioned that a

contrary holding would lead to down slippery slope whereby any individual taxpayer could attack any action of the federal government. *Id.*

The *Frothingham* Court largely based its holding on separation of powers concerns. *See id.* 487-89. Sustaining a taxpayer suit would invade the province of Congress because it would allow the Court to adjudge the constitutionality of a statute in the absence of a "direct injury suffered or threatened." *Id.* at 488. When a particular injury is alleged, the Court says what the law is to determine how the law applies to the controversy before it. *Id.* This limitation prevents the Court from undermining Congress's power to make laws. *See id.* Hence a party seeking to invoke the power of the courts "must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Id.* The Court held that Frothingham had made no such showing, so she lacked standing to sue. *Id.* Allowing her case to proceed to the merits "would be, not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we do not possess." *Id.* at 489.

Crucially, the court noted that a resident could sue to enjoin a *local* government's illegal use of tax dollars because "[t]he interest of a taxpayer of a municipality in the application of its moneys is direct and immediate," analogous to that of a shareholder's interest in a private corporation. Even so, the court rejected a First Amendment challenge by New Jersey taxpayers to a state law which authorized public school teachers to read from the Bible because that statute did not clearly involve the expenditure of funds. *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433-35 (1952). After *Frothingham*, then, federal taxpayer suits were barred, and state or local taxpayer suits were limited to those challenging expenditures of funds.

B. The *Flast* Exception

In *Flast*, *supra,* seven federal taxpayers sued to prevent federal funds from being used to finance instruction at and purchase textbooks for religious schools, alleging that such use of funds violated the First Amendment. 392 U.S. at 85-87. Titles I and II of the Elementary and Secondary Education Act of 1965 required local governments applying for federal funding to submit proposals where special educational opportunities and instructional materials would be "provided on an equitable basis for the use of children and teachers in private elementary and secondary schools," including private religious schools. *See id.* at 87. Because funds would only be disbursed to localities that adhered to the statutory requirement to fund private religious schools as well, the *Flast* plaintiffs argued, the challenged provisions of the Act "constitute a law respecting an establishment of religion" and "prohibit the free exercise of religion." *Id.* at 87. Because the plaintiffs' only alleged injury was that their tax dollars were being used in contravention of the First Amendment, *Flast* required the Court to revisit the issue of whether taxpayers had standing to challenge actions of the federal government. *See id.* at 85, 89. A divided three-judge panel held that *Frothingham* barred the taxpayers' suit. *Id.* at 88.

The Court reversed, holding that the *Flast* plaintiffs did have standing. *See id.* at 88. Writing for the majority, Chief Justice Warren rejected the government's argument that, per *Frothingham*, the requirements of Article III represent an "absolute bar" to taxpayer suits. *See id.* at 92-94, 100-01. The Court characterized *Frothingham*'s holding (and justiciability doctrine more broadly) as resting on both prudential and Constitutional considerations. *See id.* at 92-101. The Court then argued that constitutional separation of powers issues do not arise by virtue of the threshold inquiry into whether someone is a proper party to sue, but rather depending on the substance of that person's claim. *Id.* at 100-101. Thus, "the question of standing is related only to

whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 101. This depends on the interest of the party invoking federal court jurisdiction in the outcome of the case. *Id.*

The Court then articulated a test to determine when individuals have "the necessary stake as taxpayers in the outcome of the litigation to satisfy Article III requirements." *Id.* at 102. The test has two prongs. *Id.* "First, the taxpayer must establish a logical link between that status [as a taxpayer] and the type of legislative enactment attacked." *Id.* (emphasis added). Only a challenge to an exercise of Congress' power under the Taxing and Spending Clause, as opposed to an "incidental expenditure of tax funds in the administration of an essentially regulatory statute," can confer standing. *Id.*; *see* U.S. Const. art. I § 8. "Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." *Flast*, 392 U.S. at 102 (emphasis added). In other words, the taxpayer must argue that the challenged government action "exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress." *Id.* at 102-03.

The Court held that the *Flast* plaintiffs' challenge satisfied both nexuses. *Id.* at 103. Plaintiffs sought to enjoin expenditure of federal tax dollars pursuant to of Congress's Article I § 8 power to tax and spend for the "general welfare," satisfying the first nexus. *Id.*; *see* U.S. Const. art. I § 8. And plaintiffs were able to point to the religion clauses of the First Amendment as specific constitutional limitations on the exercise of the taxing and spending power. *Id.*; *see* U.S. Const. amend. I. Citing the contemporaneous writings of James Madison, "generally recognized as the leading architect of the religion clauses of the First Amendment," the Court argued that the

founders intended for the First Amendment's Establishment and Free Exercise clauses to serve as a limitation on the government's taxing and spending powers. *See Flast,* 392 U.S. at 103-04.[2]

The Court left open the possibility that other specific constitutional limitations on the exercise of the taxing and spending power besides the Establishment Clause exist. *Id.* at 105. "[W]henever such specific limitations are found, we believe a taxpayer will have a clear stake as a taxpayer in assuring that they are not breached by Congress." *Id.* at 106. Thus, *Flast's* holding was not limited to Establishment Clause-based challenges:

> [A] taxpayer will have standing consistent with Article III to invoke federal judicial power when he alleges that congressional action under the taxing and spending clause is in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. The taxpayer's allegation in such cases would be that his tax money is being extracted and spent in violation of specific constitutional protections against such abuses of legislative power.

Id. at 105-06. Such a case would be sufficiently specific and adversarial to warrant judicial resolution. *See id.* at 106.

C. SCOTUS Treatment of More Recent Taxpayer Challenges

After *Flast*, the Court granted standing to plaintiffs bringing Establishment Clause-based challenges to statutes under which federal dollars were supporting organizations that engaged in religious activity. In *Tilton v. Richardson*, for example, the Court granted taxpayers standing to object to the provision of federal construction grants for private colleges and universities under the Higher Education Facilities Act of 1963. 403 U.S. 672 (1971). While the Act specified that

[2] In *Frothingham*, by contrast, the plaintiff had not satisfied the second nexus. *See Flast*, 392 U.S. at 105. Frothingham had alleged that the Maternity Act violated her due process rights, but the Fifth Amendment Due Process Clause does not necessarily protect taxpayers from increased liability. *Id*. Frothingham had also attacked the Maternity Act as exceeding Congress's taxing and spending power and violating the Tenth Amendment by invading the province of the states. *See id*. But in doing so, she was actually "attempting to assert the States' [specifically Massachusetts's] interest in their legislative prerogatives and not a federal taxpayer's interest in being free of taxing and spending in contravention of specific constitutional limitations imposed upon Congress' taxing and spending power." *Id*. By holding that Frothingham would have failed the second prong of the *Flast* test for taxpayer standing, the Court was able to reconcile its decision in *Flast* with the precedent established by *Frothingham*. *See id*.

grant money should not go to "any facility used or to be used for sectarian instruction or as a place for religious worship, or * * * primarily in connection with any part of the program of a school or department of divinity," the government's interest in ensuring the institutions' secular character would only last 20 years. *Id.* at 672. Because the government had not demanded adequate assurance that these colleges would pay back their grant money if they began using the facilities for religious purposes, plaintiffs had demonstrated a constitutional violation. *See id.* at 683. While the *Tilton* Court never explicitly addressed the question of whether the taxpayers had standing, it ruled on the merits of their challenge, suggesting their suit fell within the *Flast* exception. *See id.; see also Tilton v. Richardson*, 399 U.S. 904 (1970) (noting probable jurisdiction).

A decade later, the Court rejected a taxpayer challenge to the Federal government's conveyance of a former army hospital to a Christian collage free of cost. *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982). Writing for the majority, Rehnquist argued that *Flast* was not satisfied because plaintiffs were challenging a decision by an administrative agency pursuant to the Federal Property and Administrative Services Act of 1949, an exercise of Congress's Property Clause power rather than its Taxing and Spending Clause power. *See id.* at 479-80. Rehnquist held that the plaintiffs had failed "to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. Yet the taxpayer plaintiffs in *Tilton* had not claimed a more particularized injury either. *See id.* at 512 (Brennan, J., dissenting).

Taken together, *Tilton* and *Valley Forge* suggest that the *Flast* exception only enables taxpayers to challenge government action pursuant to Congress's exercise of its taxing and

spending power. *Compare Tilton*, 403 U.S. 672 (granting standing to taxpayers challenging a government program of funding construction by private colleges, including religious ones) *with Valley Forge Christian Coll.,* 454 U.S. at 482 (denying standing to taxpayers challenging the government's decision to convey surplus property to a religious college free of cost). While the government action in both cases benefitted religious institutions, the plaintiffs in *Valley Forge* could not draw a close enough connection between their tax dollars and the government's action to satisfy the first nexus of *Flast. Valley Forge Christian Coll.,* 454 U.S. at 479-80.

Bowen v. Kendrick reaffirmed that, where plaintiffs challenged an exercise of the Taxing and Spending power as violating the Establishment Clause, they could be granted standing under *Flast.* 487 U.S. 589 (1988). Even though the plaintiffs were unsuccessful in convincing the Court that the Adolescent Family Life Act (AFLA) violated the Establishment Clause on its face, the Court held that their status as taxpayers was sufficient to confer standing. *Id.* at 591, 618-19. The Court rejected the government's contention that because the Secretary of Health and Human Services was involved in administering the AFLA, it was not really an exercise of Congress's taxing and spending powers. *Id.* at 619-20. Rather, because "the AFLA is at heart a program of disbursement of funds pursuant to Congress' taxing and spending powers, and appellees' claims call into question how the funds authorized by Congress are being disbursed pursuant to the AFLA's statutory mandate," there was "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power." *Id.* The Court remanded the case to the District Court to assess the merits of plaintiff's as applied challenge. *Id* at 620.

In more recent Establishment Clause taxpayer suits, the Court has held that plaintiffs lack standing—again because they were not challenging exercises of Congress's taxing and spending power. *See, e.g. Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587 (2007), *Arizona*

Christian School Tuition Org. v. Winn, 563 US 125, (2011).[3] *See also Laskowski v Spellings*, 546 F3d 822 (7th Cir. 2008) (observing that after *Hein*, "the reach of *Flast* is now strictly confined to the *result* in *Flast.* And the result in *Flast* was that the taxpayers had standing to seek an injunction to halt a specific congressional appropriation alleged to violate the Establishment Clause.") While recent decisions have been unfavorable to plaintiffs suing on an aggrieved taxpayer theory, the core holdings of *Flast* remain intact. Where plaintiffs can connect their status as taxpayers to an exercise of Congress's taxing and spending power and a specific constitutional harm (in practice, only a violation of the First Amendment's Establishment Clause), they have standing to sue in an Article III court. *See Flast*, 392 U.S. at 102.

II. Alleging that government funding for CPCs violates the Establishment Clause

A. Federal Taxpayer Standing: Title X Funding for CPCs

Some CPCs in California, New Mexico, and Washington receive federal funding via Title X.[4] *See* 42 U.S.C. § 300 et seq. (project grants and contracts for family planning services). If

[3] In *Hein v. Freedom From Religion Foundation, Inc.*, the Court denied standing to taxpayers claiming that conferences held by President Bush as part of his Faith-Based and Community Initiatives program violated the Establishment Clause. 551 U.S. at 592-93. Alito, writing for the majority, argued that because spending on these conferences "resulted from executive discretion, not congressional action," the taxpayer plaintiffs were not within the *Flast* exception. *Id.* at 605. While tax dollars were supporting the Executive Branch program, plaintiffs had not directed their challenge against a particular statute. *Id.* at 607. In dissent, Souter rejected this distinction between legislative and executive actions because the injury to taxpayers—state endorsement of religion in violation of the First Amendment—was the same. *Id.* at 637 (Souter, J., dissenting). If plaintiffs had identified and challenged the specific statute under which funds were appropriated for this Executive Branch program rather than the program itself, the Court seemingly would have granted them standing. *See id.* at 607. In *Arizona Christian School Tuition Org. v. Winn*, the Court applied the same formalistic logic to deny standing to Arizona taxpayers challenging their state's provision of tax credits for contributions to charitable organizations that provide scholarships to students attending private schools, many of which are religious. 563 US at 129, 137-38. Writing for the majority, Kennedy held that plaintiffs had failed to allege an injury sufficient to confer standing; there was insufficient evidence that Arizona taxpayers suffered economic harm. *Id.* at 137-38. Because the funding supporting students' tuition at private religious schools was not directly drawn from tax revenue and the plaintiffs did not demonstrate that Arizona's policy of providing credits increased their tax burden, this challenge failed the first prong of *Flast*. *Id.* at 137-38, 144.

[4] THE ALLIANCE: STATE ADVOCATES FOR WOMEN'S RIGHTS AND GENDER EQUALITY, STUDY OF CRISIS PREGNANCY CENTERS (CPCS) IN NINE STATES: ALASKA, CALIFORNIA, IDAHO, MINNESOTA, MONTANA, NEW MEXICO, OREGON, PENNSYLVANIA, WASHINGTON (2021) (hereinafter "Alliance Report")

CPCs are infusing religion into their operations, taxpayers could have standing to challenge CPCs' receipt of Title X funds. Because most CPCs are grounded in religious ideology, there is a strong possibility that their programs use federal funding to promote that ideology.[5]

As a program of grants, Title X is an exercise of Congress's taxing and spending power analogous to the statutes at issue in *Tilton* or *Bowen*. 42 U.S.C. § 300 et seq.; *see Tilton,* 403 U.S. 672; *Bowen*, 487 U.S. 589; *see also* U.S. Const. art. I § 8. Thus, the first prong of *Flast*, a connection between the plaintiff's status as a taxpayer and the type of "legislative enactment attacked," is satisfied. *See Flast,* 392 U.S. at 102. The second prong of *Flast* is likely also satisfied because Supreme Court precedent firmly establishes the First Amendment's religion clauses as "specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power." *Id.* at 102-03*; see, e.g., Tilton,* 403 U.S. 672; *Bowen*, 487 U.S. 589.

Whether an aggrieved taxpayer suit could in fact enjoin CPCs from receiving Title X funding depends on the merits of the claimed Establishment Clause violation. To assess whether a statute violates the Establishment Clause, courts ask whether: (1) the statute has "a secular legislative purpose," (2) "[the statute's] principal or primary effect…neither advances nor inhibits religion…" and (3) "the statute foster[s] an excessive government entanglement with religion." *Lemon v Kurtzman*, 403 U.S. 602, 612-13 (1971) (internal citations omitted). Because Title X is primarily a program of family planning grants for low-income families, it would easily satisfy *Lemon*'s first two criteria. *See id; see also* 42 U.S.C. § 300 et seq. Whether disbursing Title X funding to CPCs fosters "an excessive government entanglement with religion" would be

[5] For example, Obria, a CPC network affiliated with Catholic beliefs, receives Title X funding. CAMAPIGN FOR ACCOUNTABILITY, TROLLING FOR TITLE X FUNDS: HOW BUSINESSWOMAN KATHLEEN EATON BRAVO DIVERTED FEDERAL FUNDS DESIGNATED FOR FAMILY PLANNING SERVICES TO HER EMPIRE OF DELIBERATELY MISLEADING CLINICS (2019), https://campaignforaccountability.org/wp-content/uploads/2019/05/CfA-Report-Obria-History-5-13-19.pdf.

a fact-intensive inquiry depending on how much CPCs are engaging in religious activity. *See Lemon*, 403 U.S. at 613.

B. State Taxpayer Standing: State Funding for CPCs

State taxpayers can also challenge unconstitutional state spending. *Doremus*, *supra*, held that state taxpayer plaintiffs only had standing to bring a "good-faith pocketbook action," meaning plaintiffs were required to trace the specific economic harm they suffered because of a state's allegedly unconstitutional act. *See* 342 U.S. at 434 (citing *Frothingham*, 262 U.S. at 488); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 345 (2006) ("The…rationale for rejecting federal taxpayer standing applies with undiminished force to state taxpayers."). It is, however, unclear whether the *Flast* exception applies any differently to *state* taxpayer challenges compared to *federal* ones, largely because most recent caselaw reverses grants of standing to taxpayer plaintiffs. *See, e.g., Arizona Christian School Tuition Org.*, *supra*, *Ansley v. Warren*, 861 F.3d. 512 (4th Cir. 2017) (reversing the District Court's holding that North Carolina taxpayers had standing to challenging a state statute allowing public officials to recuse themselves from performing same-sex marriages), *Barber v. Bryant*, 860 F3d 345 (5th Cir. 2017) (reversing the District Court's holding that Mississippi taxpayers had standing to challenge a state statute barring discrimination against people who act in accordance with anti-LGBTQ religious beliefs). The Supreme Court distinguished *DaimlerChrysler Corp* from Flast, however, because *DaimlerChrysler* did not allege an Establishment Claus violation. *See id.* at 349. In *Arizona Christian School Tuition Org*, the problem was not that the taxpayers challenged state rather than federal action, but instead that the nexus requirements of *Flast* were not met (in other words, that the plaintiffs could not connect their status as taxpayers to the state's action). *See* 563 U.S. at 138-145 (citing taxpayer cases challenging federal spending as precedent and denying

standing because the first nexus required by *Flast* was not met). Thus, while it is an open question whether the *Flast* analysis changes for state as opposed to federal taxpayer challenges, there is no reason to think that attacking state spending presents an additional barrier.[6]

Several states provide funding for CPCs, including Pennsylvania and Minnesota.[7] Taxpayers in those states could similarly allege Establishment Clause violations sufficient to confer Article III standing. *See supra* Part II-A. The Establishment Clause is binding on the states through the Fourteenth Amendment. *Everson v Bd. of Ed. of Ewing Twp.*, 330 US 1, 8 (1947); *Murdock v. Pennsylvania*, 319 US 105, 108 (1943). Again, the success of Establishment Clause-based claims on the merits would depend on plaintiffs' ability to demonstrate that CPC activity promotes an "excessive government entanglement with religion." *Lemon*, 403 U.S. at 613.

1. Pennsylvania

Pennsylvania contracts with Real Alternatives, a CPC network, to administer its Pregnancy and Parenting Support Services (formerly Alternatives to Abortion) program.[8] Pennsylvania's Department of Human Services (DHS) funds Real Alternatives through a combination of federal Temporary Assistance for Needy Families (TANF) monies and State

[6] In a decision about the merits of an Establishment Clause challenge, the Supreme Court affirmed lower courts' determination that state taxpayer plaintiffs had standing. *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n. 5 (1985). *See also Pedreira v Kentucky Baptist Homes for Children, Inc.*, 579 F.3d 722, 733 (6th Cir. 2009) (granting standing to state taxpayer plaintiffs challenging a state-funded religious foster care organization's practice of denying employment to LGBTQ individuals as violating the Establishment Clause). *But see Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017) (denying standing to state taxpayers invoking *Flast* exception); *Ansley v. Warren*, 861 F.3d. 512 (4th Cir. 2017) (same).

[7] Alliance Report, *supra* note 4.

[8] Letter from Division of Procurement, Pennsylvania Department of Health, to Real Alternatives (June 24, 2019), https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html (obtained by Campaign for Accountability and published via Document Cloud).

General Fund monies according to a grant agreement.[9] Funds are currently appropriated for Real Alternatives as part of Pennsylvania's annual budget. *See* 72 PA. STAT. ANN. § 1729-B(5).

Based on a search of Lexis, West, and Google, there is no specific state statute establishing nor implementing the Pregnancy and Parenting Support Services/Alternatives to Abortion program. Instead, the program is part of Pennsylvania's State Plan for its TANF block grant.[10] The renewal of the program each year thus appears to be a matter committed to the Pennsylvania DHS's discretion. *Cf. Hein*, 551 U.S. at 605 (use of taxpayer dollars for President Bush's Faith-Based and Community Initiatives program was a matter of executive discretion). Given *Valley Forge* and *Hein*'s emphasis on attacking a specific legislative enactment as a prerequisite for claiming taxpayer standing under the *Flast* exception, it could be difficult to challenge Pennsylvania's funding of Real Alternatives on an aggrieved taxpayer theory in Federal Court. *See Valley Forge*, 454 U.S. at 479; *Hein*, 551 U.S. at 605. It is possible to argue that the distinction between executive and legislative actors in the implementation of an unconstitutional law is artificial, given that executive branch actors ultimately derive their discretionary authority from an authorizing statute. *See Hein*, 551 U.S. at 637 (Souter, J., dissenting). Considering that the trend in Supreme Court doctrine has been towards narrowing *Flast*, this argument is unlikely to succeed. *See Arizona Christian School Tuition Org*, 861 F.3d. 512.

2. Minnesota

Minnesota sponsors a Positive Alternatives program like Pennsylvania's, providing grants to nonprofits "promoting healthy pregnancy outcomes [i.e., not abortion] and assisting

[9] *Id.*
[10] PA. DEP'T OF HUM. SERVS., 2021 TANF STATE PLAN 35-36 (effective October 2021), https://www.dhs.pa.gov/Services/Assistance/Documents/TANF%20State%20Plan%20effective%20date%20October%201_%202021%20Clean%20080421.pdf.

pregnant and parenting women in developing and maintaining family stability and self-sufficiency."[11] Grantee organizations include several CPCs, with a total of $2,808,891 going to CPCs in 2021.[12] Some grantee organizations are explicitly religious: Catholic Charities of the Diocese Winona-Rochester, for example, receives $248,541 annually under the Positive Alternatives program.[13] While none of the other grantees have explicitly religious names, many are likely also motivated by religious ideology or affiliated with religious groups.[14]

Unlike Pennsylvania's program, Minnesota's Positive Alternatives program is specifically authorized by statute. MINN. STAT. § 145.4235 (2021). The statutory criteria for grant recipients make no mention of a need to refrain from religious activity. *See id.* §§ 2(c). The Commissioner of Minnesota's Department of Health is responsible for overseeing the program and can cease funding to grantees that fall out of compliance with the statute. *See id.* §§. 4. Even though the Commissioner has discretion in administering the statute, her authority is grounded in a legislative mandate. *See id.* Thus, an aggrieved taxpayer challenge to Minnesota's statute would be analogous to *Bowen v. Kendrick*, where the Court granted taxpayer standing and rejected the government's argument that an Executive Branch member's role in administering a statute brought the case outside the ambit of *Flast*. *See* 487 U.S. at 619-20. The statute establishing Minnesota's Positive Alternatives program is primarily concerned with appropriating funds. *See* MINN. STAT. § 145.4235 (2021). Hence the statute is best understood as

[11] *Positive Alternatives Overview*, MINN. DEP'T OF HEALTH, (October 10, 2022), https://www.health.state.mn.us/people/womeninfants/positivealt/overview.html.
[12] San Stroozas, *Every Fake Abortion Clinic in Minnesota, Mapped*, RACKET (August 26, 2021), https://racketmn.com/every-fake-abortion-clinic-in-minnesota-mapped/ (referring to CPCs as "fake clinics").
[13] MINN. DEP'T OF HEALTH, 2021 - 2025 POSITIVE ALTERNATIVES GRANT AWARDS WITH PROGRAMS OR SERVICES, (2021), https://www.health.state.mn.us/docs/people/womeninfants/positivealt/paagrantees202125.pdf.
[14] *See* Nancy Gibbs, *The Grassroots Abortion War*, TIME (Feb. 15, 2007), https://web.archive.org/web/20070218124958/http://www.time.com/time/printout/0,8816,1590444,00.html.

an exercise of the state's taxing and spending power, satisfying the first nexus from *Flast*. *See Flast*, 392 U.S. at 102.

The second nexus requires the taxpayer to connect their status as a taxpayer to "the precise nature of the constitutional infringement alleged." *Id.* The Court's jurisprudence since *Flast* firmly establishes that the First Amendment's religion clauses serve as a limitation on government taxing and spending powers, and violation of them is a constitutional injury sufficient to confer standing on any affected taxpayer. *See Flast*, 392 U.S. at 102; *see also supra,* Section I-C-1. If Minnesota's Positive Alternatives funding is being used to support CPCs who also engage in religious activity, a taxpayer could have standing to challenge MINN. STAT. § 145.4235 (2021). The taxpayer's injury is arguably even more particularized than in *Flast* because the pool of taxpayers in Minnesota is considerably smaller than the pool of all federal taxpayers. *See Frothingham*, 262 U.S. at 487; *Flast* 392 U.S. at 106.

There is a jurisdictional problem with attempting to challenge this law in Federal Court, however: the statute states that the Minnesota Supreme Court has original jurisdiction over an action challenging its constitutionality. MINN. STAT. § 145.4235 Subd. 6 (2021).

III. Consequences of invoking the *Flast* exception before the current Supreme Court

Regardless of the legal precedent supporting an Establishment Clause-based taxpayer challenge to funding for CPCs, the likelihood of success before the current Supreme Court is extremely low. In *Hein*, Justice Scalia, joined by Justice Thomas, advocated for overruling *Flast* and eliminating its exception to the rule against taxpayer standing altogether. *See Hein*, 551 U.S. at 618 (Scalia, J., dissenting). Scalia characterized the harm suffered by the plaintiffs in *Flast* and its progeny as a "psychic injury" rather than a "wallet injury." *See id.* 619-30. Scalia and Thomas again advocated for overturning *Flast* in a concurring opinion in *Arizona Christian School*

Tuition Org., 563 U.S. at 147 (Scalia, J., concurring).[15] The fact that Scalia wrote separately suggests that Kennedy's controlling opinion in *Arizona Christian School Tuition Org.* leaves the core holdings of *Flast* intact.[16] But given changes in the composition of the Supreme Court since 2011, it is possible that the Court would dispose of an aggrieved taxpayer suit by overruling *Flast.* But it may be equally likely the Court would continue the trend of *Hein* and *Arizona Christian School Tuition Org.* by finding some way to distinguish *Flast*, narrowing its holding further without overruling it outright. *See supra* § I-C-1.

IV. Conclusion

While there is a solid legal argument that federal or Minnesota taxpayer plaintiffs could challenge government funding for CPCs as violating the Establishment Clause, this strategy would require intensive fact investigation into CPCs' everyday practices and would only affect a small proportion of all CPCs nationwide. Especially given the Supreme Court's growing hostility to taxpayer standing, it is probably not worth pursuing an aggrieved taxpayer strategy in federal court at this time.

[15] Even the majority opinion in *Arizona Christian School Tuition Org.* significantly narrowed the *Flast* exception, distinguishing the Arizona program from *Flast* because the state was providing tax credits as a subsidy rather than taxing directly. 563 U.S. at 142. In dissent, Kagan complained that the majority opinion "enables the government to end-run *Flast's* guarantee of access to the Judiciary. From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion." *Id.* at 148 (Kagan, J., dissenting).

[16] *See* Lyle Denniston, *Opinion Recap: The Near-end of "Taxpayer Standing,"* SCOTUSBLOG (Apr. 4, 2011, 11:26 AM), https://www.scotusblog.com/2011/04/opinion-recap-the-near-end-of-taxpayer-standing/.

Applicant Details

First Name	**Andrew**
Last Name	**Faisman**
Citizenship Status	**U. S. Citizen**
Email Address	**af3149@columbia.edu**
Address	**Address** Street **250 East 40th St., Apt. 16A** City **New York** State/Territory **New York** Zip **10016** Country **United States**
Contact Phone Number	**9148440381**

Applicant Education

BA/BS From	**McGill University, Canada**
Date of BA/BS	**May 2012**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 1, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Science and Technology Law** **Columbia Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Talley, Eric
etalley@law.columbia.edu
Sturm, Susan
ssturm@law.columbia.edu
212-854-0062
Hamann, Kristine
khamann@pceinc.org
Judge, Kathryn
kjudge@law.columbia.edu
212-854-5243

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Andrew Faisman
250 East 40th St., Apt. 16A
New York, NY 10016
(914) 844-0381
af3149@columbia.edu

April 30, 2023

The Honorable Kiyo A. Matsumoto
United States District Court, Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Matsumoto,

I am a 2022 graduate of Columbia Law School and an associate at Quinn Emanuel Urquhart & Sullivan, LLP. I write to apply for a clerkship in your chambers beginning in 2025.

The strengths I will bring to this position include a proven ability to thrive in a collaborative and fast-paced environment, a strong work ethic, and excellent legal research and writing skills. Prior to attending law school, I worked for seven years at Epic Systems, a healthcare software company. I was responsible for designing IT architecture for hospitals, working under intense time pressure and in constant collaboration with colleagues and clients. I also had extensive managerial responsibilities. As a student at Columbia, I took every opportunity to deepen my legal research and writing skills. One example of this is my Note, which was published in the *Columbia Law Review* and serves as my writing sample. It offers a framework that judges can use to assess the policy goals behind class actions.

My core areas of interest are complex litigation, antitrust law, and technology platforms. I am currently working on several major antitrust class actions as an associate at Quinn Emanuel, including some for which we are on the plaintiff side and some for which we are on the defense side. After clerking, I plan to either pursue partnership at a law firm or transition to a career at the Department of Justice. I also intend to remain engaged in the academic community by teaching law school classes as an adjunct professor.

Enclosed are my resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professor Susan Sturm (212 854-0062; ssturm@law.columbia.edu), Professor Kathryn Judge (212 854-5243; kjudge@law.columbia.edu), Professor Eric Talley (212 854-0437; etalley@law.columbia.edu), and Ms. Kristine Hamann (917 855-9065; khamann@pceinc.org). Two additional references are listed on the following page.

Please do not hesitate to contact me should you need any further information. I am grateful for your consideration.

Respectfully,

Andrew Faisman

Additional References

Hon. Paul G. Gardephe
District Judge, Southern District of New York
(212) 805-0224
Paul_G_Gardephe@nysd.uscourts.gov
Relationship: I interned in Judge Gardephe's chambers, assisting with legal research and writing for a variety of memos and opinions.

Mr. Steve Cirami
Head of Class Actions and Corporate Actions, Broadridge Financial Solutions
(631) 274-2700
Stephen.Cirami@broadridge.com
Relationship: Mr. Cirami was my supervisor for a summer internship with Broadridge.

ANDREW FAISMAN

250 East 40th St., Apt. 16A, New York, NY 10016 • (914) 844-0381 • af3149@columbia.edu

EDUCATION

Columbia Law School, New York, NY
Juris Doctor, received May 2022
Honors: James Kent Scholar; Harlan Fiske Stone Scholar; Public Interest Honoree
Activities: *Columbia Law Review*, Online Operations Editor
Teaching Assistant: Civil Procedure (Prof. Susan Sturm); Corporations (Prof. Eric Talley)
Publications: Note, "The Goals of Class Actions," *Columbia Law Review* (Nov. 2021)
"The Problem-Solving Prosecutor: Modern Variations on the Crime Strategies Unit" (with Kristine Hamann), Prosecutors' Center for Excellence (Jan. 2021)

McGill University, Montreal, Canada
Bachelor of Arts, First Class Honors, received May 2012
Majors: Mathematics & Political Science
Thesis: "The Origins of Pharmaceutical Innovation: Evidence from Patent Citation Data"
Activities: *McGill Journal of Political Studies*, Editor

EXPERIENCE

Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY
Associate October 2022 –
Summer Associate May 2021 – August 2021
Work on major antitrust class actions from both the plaintiff side and the defense side.

Hon. Paul G. Gardephe, Southern District of New York, New York, NY
Judicial Intern September 2020 – December 2020
Drafted judicial opinions and memos analyzing motions to dismiss, recommendations from magistrate judges, and *pro se* complaints. Conducted substantive research in securities law, intellectual property law, and civil rights law.

Prosecutors' Center for Excellence, New York, NY
Legal Intern May 2020 – October 2020
Co-authored an article providing practical guidance on how prosecutor's offices can implement intelligence-driven prosecution, community partnerships, and alternatives to incarceration. Interviewed 13 prosecutor's offices.

Broadridge Financial Solutions, Lake Success, NY
Summer Legal Intern, Global Class Actions June 2020 – August 2020
Wrote a series of articles summarizing securities class action law for nonlawyers. Conducted research for a law review article about international trends in class actions.

Epic Systems, Verona, WI
Team Lead Manager, Analytics Infrastructure Technical Services December 2017 – July 2019
Supervised a team of 37 direct and indirect reports. Set direction for IT architecture and customer support of Epic's analytics division. Maintained customer relationships with over 100 major hospital organizations.

Team Lead, Analytics Infrastructure Technical Services May 2014 – November 2017
Directly supervised 12 technical consultants for healthcare analytics IT, providing feedback and career guidance. Coordinated technical support and software design for Clarity, Epic's core analytics platform.

Technical Coordinator, CVS Health February 2014 – January 2016
Coordinated hardware and IT architecture setup for the first retail health implementation of Epic's software. Closely collaborated with leadership of CVS Health. Led a team of 15 Epic staff across various roles.

Analytics Infrastructure Technical Services July 2012 – April 2014
Provided technical guidance to database administrators at major healthcare organizations using Epic's software.

LANGUAGE SKILLS: Russian (native)

Columbia
Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

05/31/2022 16:36:07

Program: Juris Doctor

Andrew Faisman

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6241-1	Evidence	Capra, Daniel	4.0	A
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	A
L6672-1	Minor Writing Credit	Judge, Kathryn	0.0	CR
L8417-1	S. The Nuts & Bolts of Securities Litigation; The Practitioner's Perspective	Conn, Jennifer; North, Julie	2.0	A
L6683-2	Supervised Research Paper	Judge, Kathryn	1.0	A
L6822-1	Teaching Fellows	Talley, Eric	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9069-1	C. Law and Economics	Gillis, Talia; Judge, Kathryn	2.0	A
L6670-1	Columbia Law Review		0.0	CR
L6256-1	Federal Income Taxation	Schizer, David M.	4.0	A-
L6274-2	Professional Responsibility	Gupta, Anjum	2.0	A
L6683-1	Supervised Research Paper	Judge, Kathryn	1.0	A
L6822-1	Teaching Fellows	Sturm, Susan P.	4.0	CR

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6169-2	Legislation and Regulation	Johnson, Olatunde C.A.	4.0	A
L6391-1	Regulation of Financial Institutions	Judge, Kathryn	3.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Khan, Lina	2.0	CR
L7778-1	The Law of Infrastructure Industries	Khan, Lina	4.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6645-1	Columbia Science and Technology Law Review		0.0	CR
L6231-1	Corporations	Talley, Eric	4.0	A
L6661-1	Ex. Federal Court Clerk - SDNY	Moller, Tiffany; Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Moller, Tiffany; Radvany, Paul	3.0	CR
L6675-1	Major Writing Credit	Sturm, Susan P.	0.0	CR
L6338-1	Patents	Long, Clarisa	3.0	A
L6683-1	Supervised Research Paper	Sturm, Susan P.	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Greene, Jamal	4.0	CR
L6108-2	Criminal Law	Teichman, Doron	3.0	CR
L6172-1	Empirical Analysis of Law	Fagan, Jeffrey A.	3.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-10	Legal Practice Workshop II	Paulson, Susan	1.0	CR
L6116-1	Property	Scott, Elizabeth	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-8	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-6	Civil Procedure	Sturm, Susan P.	4.0	B
L6105-1	Contracts	Kraus, Jody	4.0	A
L6113-3	Legal Methods	Bobbitt, Philip C.	1.0	CR
L6115-10	Legal Practice Workshop I	Paulson, Susan; Yoon, Nam Jin	2.0	HP
L6118-1	Torts	Rapaczynski, Andrzej	4.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 85.0

Total Earned JD Program Points: 85.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2021-22	James Kent Scholar	3L
2020-21	James Kent Scholar	2L
2019-20	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	160.0

April 30, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to offer a strong and unreserved recommendation for Mr. Andrew Faisman, a recent JD graduate of Columbia Law School, in connection with his application for a judicial clerkship in your chambers. I have known Mr. Faisman since fall 2020, across multiple capacities. He has excelled in each. Andrew has a curious mind, a respectful temperament, and a fertile intellect. I have no doubt that he has the makings of a superb clerk and lawyer. He has truly earned my strong and unreserved recommendation.

I first met Mr. Faisman when he was enrolled in my corporations class in the autumn term of 2020. This is a very challenging (and very large) course, and I confront students not only a significant dose of statutory and doctrinal material, but also a relatively sizable dollop of organizational theory, economics, corporate finance and accounting. Beyond statutes and doctrine, they are expected to become conversant in (and understand criticisms of) the ideas of Coase, Hayek, Williamson, Friedman, while mastering basic accounting and valuation concepts. The challenge was doubly compounded due to COVID restrictions, as nearly all the teaching was in a hybrid format (mixed between Zoom and live lecture for select students each day.) Andrew, however, was ready for the task: he was animated, asked excellent questions, responded exceptionally well to cold calls, and frequently visited my office hours with interesting follow up questions and reflections. I expected a lot from him on the exam, and he certainly did not disappoint: his final grade for the class was an “A”, and his exam was among the top five submissions in the 120-person class. As I reviewed Andrew’s exam for purposes of writing this letter, I was once again struck by his excellent writing skills – his cogent and precise essay answers scored nearly the highest in the class on that portion of the exam (though his exam was very strong across all components).

After the semester concluded, I approached Andrew in an attempt to recruit him to become a teaching assistant for my Corporate Law class in the spring of 2022. This was a particularly difficult term, because COVID protocols still required masking in the class, and I had been saddled with two sections of the course (nearly 300 students in all). I had weekly meetings with the teaching assistants to help them design their own teaching sections and to assess how class was progressing. In both capacities Andrew stood apart in his attention to detail, dependability, creativity, and constructive suggestions. His suggestions, in fact, redirected several strategies I had been contemplating in the class (and his ideas were clearly far superior).

Although I did not supervise any student writing of Andrew’s, I hear from my colleagues that did that his writing skills are exceptional. This is no surprise, given the strength of his intellectual presence in other capacities I have observed him.

All his (considerable) talents aside, Andrew is also a delightful person. He is respectful, funny, thoughtful and generous. He cares about his profession and the world, and he no doubt will be putting his Columbia Law degree to excellent use for decades. I expect I will work to stay in touch with him long after graduation.

For the foregoing reasons, Mr. Faisman has won my strong recommendation, with no reservations whatsoever.

If you have any questions about this exceptional candidate, please do not hesitate to contact me at the email address and number above.

Sincerely,

Eric L. Talley
Sulzbacher Professor of Law

May 11, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I am writing to recommend Andrew Faisman for a position as your law clerk. I first got to know Andrew as a student in my 33-person Civil Procedure class during his first semester of law school. He frequently attended office hours, and we had many occasions to discuss his growing understanding of civil procedure, as well as his long-term career aspirations. I then supervised Andrew's note, entitled The Goals of Class Actions: Two Clashing Views and a Path Forward, which was selected for publication in the Columbia Law Review. I was so impressed with Andrew's overall performance that I asked him to serve as a teaching assistant the following fall semester for my Civil Procedure course. Andrew has a first-rate legal mind, outstanding research skills, superb writing ability, unusual facility with complex facts, and technological fluency. He also has the personal qualities that distinguish great lawyers, including humility, empathy, diligence and resilience. He is one of the strongest clerkship candidates I have recommended in recent years. I recommend him without qualification.

From the outset in Civil Procedure, Andrew brought a laser-sharp intellect to his analysis and mastery of the law. His class participation was exemplary—measured to create space for other students in a small class yet consistently insightful and sophisticated. I came to rely on Andrew to ask the questions that would highlight the contested or uncertain aspects of the law, and to offer ways of thinking that would provide clarity and consistency, or at least greater comprehension of the complexities, to the legal terrain. His change-in-fact memo illustrates these strengths. Each student submitted a memo identifying the smallest change in fact that would change the outcome of the case. These are ungraded, but I offer comments and suggestions. Andrew's memo, on a permanent injunction case, was the strongest of the semester. He concisely and precisely identified the considerations most important to the Court's reasoning, and then, in three paragraphs, sketched out an alternative opinion that would lead the Court to deny a permanent injunction—a truly impressive performance.

Andrew's summary judgment argument was also outstanding. He represented the defendants moving for summary judgment in a sexual harassment case. He was one of the few students who correctly applied the standard for summary judgment on an issue for which the defendants bear the burden of persuasion at trial. His argument was clear, extremely well-reasoned, marshaled facts brilliantly, and used the Supreme Court's justifications for summary judgment to buttress his position. His argument was unusually sophisticated and effective, one of the two best in the class.

Andrew's performance on the final exam—on its face disappointing to both of us in light of his obvious mastery of the material—provided an occasion for me to witness Andrew's character, resilience, genuine commitment to the law, and intellectual strengths. I had expected Andrew to excel on the final, and his exam earned him a B instead. We both wondered what happened. Andrew used the grade as an opportunity to learn. I met with Andrew twice, and we went over his exam with a fine toothed comb. We discovered that, perhaps because of his background in software, Andrew was accustomed to things making perfect sense. He tried to make more order out of the caselaw than actually was there. My exam question forced students to deal with the ambiguities and uncertainties, and Andrew learned through this process how to approach areas of the law that do not have a perfect logical structure, and to accept that the law is sometimes like that. He applied this insight to his approach going forward, and his transcript reflects both the success of this strategy and the anomaly that his Civil Procedure grade represents. His curiosity, openness, and resilience in response to the grade, as well as his ability to grow intellectually from the experience, were quite extraordinary. His overall performance led me to ask him to serve as a Teaching Assistant.

Andrew's Law Review Note offers additional evidence of his outstanding intellect, analytical skill, research capacity, and writing skill. He first developed his interest in class actions during civil procedure. He developed an original theoretical argument in the field of class actions—a particularly impressive accomplishment in a crowded field of academic literature. He put this theory to practical use—applying it first to understand and critique the two dominant approaches to class actions in both the scholarly literature and the policy arena had several ideas about the doctrine-how it should develop, and then to reconcile the two theories of class action in a manner that can address the concerns of each. In the process of supervising the note, I witnessed first-hand Andrew's ability to assimilate large amounts of material, to develop a theory without becoming wedded to it in the face of contrary evidence, to produce high quality work under a deadline, and to receive and make the most of feedback. I was thrilled and not surprised when his note was accepted for publication by the Columbia Law Review.

Andrew is also a pleasure to work with. He manages to be kind and generous even as he is exacting and goal-oriented. He brings an unusual level of maturity, groundedness, and reliability to his work. He consistently met deadlines, and showed a willingness to support other students in the class when they struggled with the material. I have no doubt that he will be a tremendous asset to the chambers.

I couldn't be more enthusiastic about Andrew's candidacy as a law clerk. I would welcome the opportunity to speak with you about him. I can be reached at 917-846-3502.

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

Best regards,

Susan Sturm

Susan Sturm - ssturm@law.columbia.edu - 212-854-0062

April 30, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

It is my great pleasure to recommend Andrew Faisman. Andrew worked as a law intern with Prosecutors' Center for Excellence (PCE) during the summer of 2020. Andrew stood out from the beginning and his abilities continued to impress me throughout his internship. PCE has had many interns and Andrew is the best intern we have had.

Given Andrew's background in technology, I assigned him to work on a paper that explains the role of a Crime Strategy Unit (CSU) in a prosecutor's office. ACSU is a vehicle for implementing intelligence driven prosecution and uses data and technology to identify crime trends and to support prosecutions. Though Andrew knew nothing about the subject when we started, he quickly absorbed the available literature and joined me for multiple calls with prosecutors around the country. Andrew was also part of an advisory group of experienced prosecutors who assisted with guiding the paper. Andrew soon became an equal partner in the project.

Andrew's intelligence and insights were critical throughout the writing of the article. He wrote excellent first drafts and came up with the ultimate concept for crystalizing the principles at play. Aside from being a great writer, Andrew was able to distill the many facts, push for more details and gather the information into coherent categories. His contribution to the article was so substantial that he is listed as a co-author with me. The article is available here: https://pceinc.org/the-problem-solving-prosecutor-modern-variations-on-the-crime-strategies-unit/.

In addition to his writing and analytical abilities, Andrew is a very nice person. He is friendly, calm, and collaborative in his dealings with the interns and prosecutors. He was happy to share credit with others and was always open to suggestions for improvement whether they came from interns or experienced attorneys. At the same time, he could persuasively articulate his points of view, which often won the day.

Andrew has my highest endorsement. My advice is: "Hire him." Please feel free to contact me if you require additional information.

Sincerely,

Kristine Hamann

Executive Director

khamann@pceinc.org

917-885-9065

April 30, 2023

The Honorable Kiyo Matsumoto
Theodore Roosevelt United States Courthouse
225 Cadman Plaza East, Room 905 S
Brooklyn, NY 11201-1818

Dear Judge Matsumoto:

I write to recommend Andrew Faisman for a clerkship in your chambers. Andrew was an all-star student with exceptional writing skills. I think he would make a superb clerk and that you would enjoy working with him.

I first got to know Andrew as a student in my Financial Institutions course. It's a lecture course that I was teaching in a hybrid format, making it difficult for me to really get to know the students. Nonetheless, by the end of the term, Andrew had emerged as one of the most impressive students in the class. Although quiet initially, his consistent preparedness and insightful comments helped him to stand out. He also exhibited a seemingly genuine interest in understanding the complexities that are key to financial regulation. And his exam was stellar, as his transcript reflects. Yet it was our interactions the subsequent year – when Andrew was in the Law and Economics workshop that I co-led and when I got to supervise one of Andrew's research projects – that I came to appreciate why he would be such an outstanding clerk.

Andrew approached me early in the year about a possible writing project. He had written a student note during his 2L year, and he now sought to undertake another ambitious research project exploring how to address the rise of fake online reviews. He then charted out and executed his own plan for undertaking the necessary research and produced a piece that I expect will become a respected piece of scholarship. I could not have been more impressed with his internal drive, his openness to feedback, and the quality of mind that came through as we worked together.

I saw similar characteristics on display during the Law and Economics workshop. As with Financial Institutions, Andrew was quieter than many of his classmates. Yet that only enhanced the impact of his contributions. He shared only when he could offer a truly insightful comment or help to frame the issue at stake in a new and better way. This seminar also gave me the chance to see how he worked with peers, as an important component was a group presentation. Andrew's group was one of the strongest. And although the presentation was evenly spread across the three students leading the session, I could sense Andrew's perspective shaping much of the conversation, suggesting he had worked closely to really help his classmates.

It would be a pleasure to answer any additional questions you may have about Andrew's candidacy. Please do not hesitate to reach out via email, kjudge@law.columbia.edu, or you can reach me on my cell, 206-852-5027.

Best regards,

Kathryn Judge
Harvey J. Goldschmid Professor of Law
Columbia Law School

Andrew Faisman
(914) 844-0381
af3149@columbia.edu

Writing Sample

This writing sample is my Note, published in the November 2021 issue of the *Columbia Law Review*. Please see the abstract on the first page for a summary.

In writing this Note, I benefited from high-level feedback from Professor Susan Sturm, Professor Bert Huang, Professor David Marcus, and several of my fellow students. During the publication process, members of the *Columbia Law Review* reviewed this Note to ensure proper substantiation, citation style, and grammar.

THE GOALS OF CLASS ACTIONS

*Andrew Faisman**

Class actions for monetary relief have long been the subject of intense legal and political debate. The stakes are now higher than ever. Contractual agreements requiring arbitration are proliferating, limiting the availability of class actions as a vehicle for collective redress. In Congress, legislative proposals related to class actions are mired in partisan division. Democrats would roll back mandatory arbitration agreements while Republicans would restrict class actions further.

This Note explains that many of the battles over class actions for monetary relief can be understood as disagreements over what goals they are supposed to serve. It examines two broad justifications for class actions: efficiency and representation. It then offers a taxonomy of the goals of class actions. The efficiency justification is associated with the goals of compensation and monetary deterrence; the representation justification is associated with the goals of providing access to justice and shaping laws and norms. An analysis of recent legislative proposals demonstrates that congressional Republicans prioritize the goal of compensation while congressional Democrats prioritize both representational goals.

This Note argues that the goals of class actions can be reconciled. It offers a framework for distinguishing between those class actions that are supposed to serve efficiency goals and those class actions that are supposed to serve representation goals. This framework can guide courts toward a more expansive understanding of the policy interests behind class actions. Furthermore, this reconciled understanding of class actions may offer a path toward crafting legislative compromises that are reasonably compatible with the current views of both Republicans and Democrats.

* J.D. Candidate 2022, Columbia Law School. The author is especially grateful to Professor Susan Sturm and Professor Bert Huang for their guidance and insight during the process of writing this Note, as well as to Steve Cirami for inspiring him to explore these issues in the first place. For thoughtful feedback at various stages of this project, the author would like to thank John Clayton, Joanna Faisman, Professor David Marcus, and Alexandra Nickerson. For tenacity in editing this Note, the author would also like to thank Rivky Brandwein, Kimberly Chen, Corine Forward, Taoxin Wang, Brandon R. Weber, and the staff of the *Columbia Law Review*.

INTRODUCTION

Debates over class actions have often been compared to a war.[1] This war centers on class actions for monetary relief, which aggregate many damages claims into a single lawsuit.[2] One side defends such class actions as a tool for providing access to justice and keeping the powerful in check.[3] The other side accuses them of enabling meritless litigation and bleeding money from corporations.[4] This war is fought on many fronts. Some question whether

1. Four decades ago, Professor Arthur R. Miller described these debates as a "holy war." Arthur R. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem," 92 Harv. L. Rev. 664, 664 (1979) [hereinafter Miller, Of Frankenstein Monsters and Shining Knights]. Professor David Marcus has spoken of the "class action wars." David Marcus, The History of the Modern Class Action, Part I: *Sturm Und Drang*, 1953–1980, 90 Wash. U. L. Rev. 587, 610–14 (2013) [hereinafter Marcus, History of the Modern Class Action].

2. This Note focuses on class actions for monetary relief. Other categories of class actions do not raise most of the issues this Note discusses and should be treated as distinct. See Maureen Carroll, Class Action Myopia, 65 Duke L.J. 843, 850 (2016) ("Not only does the current debate largely fail to reflect the function and importance of subtypes other than the aggregated-damages class action, but more important, it also has produced across-the-board changes in class-action law that have made the purposes of the other subtypes more difficult to achieve.").

3. E.g., Elizabeth J. Cabraser, The Class Abides: Class Actions and the "Roberts Court", 48 Akron L. Rev. 757, 800–01 (2015) ("May [class actions] abide . . . to serve the good of the many in our uniquely challenging time; and to preserve for adjudication those trespasses to our economic and personal rights and interests that our individual resources, or those of the courts themselves, do not permit us to effectively pursue alone."); Arthur R. Miller, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 Emory L.J. 293, 312 (2014) ("[S]ooner or later, thoughtful people will be distressed by the realization that restricting class actions and other forms of group litigation inevitably leads to the under-enforcement of important public policies.").

4. E.g., Linda S. Mullenix, Ending Class Actions as We Know Them: Rethinking the American Class Action, 64 Emory L.J. 399, 405 (2014) (arguing that class actions for damages are dysfunctional and that class actions should be limited to injunctive relief). Sometimes, concerns along these lines are targeted at specific types of damages class actions rather than being

it is desirable, or even constitutional, for class actions to be binding upon class members without their express consent.[5] Others argue that class action plaintiff's attorneys are subject to distorted incentives that cause them to litigate too aggressively,[6] or perhaps to settle too cheaply.[7] The much-contested certification requirements of Federal Rule of Civil Procedure 23 (Rule 23) have been subject to renewed scrutiny under the Roberts Court.[8] The class action war is now fifty years old.[9] Class actions have been debated endlessly, and many of the same themes have reverberated through the decades. Disagreements between the two sides are as heated as ever. Class actions have often proven resilient, and they have often been slow to change. Yet they *have* changed, and recently they have been changing fast. It now appears that the class action war has reached an important new juncture.

Over the past decade, proponents of class actions have decidedly been put on the defensive. In a line of cases beginning with *AT&T Mobility LLC v. Concepcion*, the Supreme Court has held that contractual agreements requiring individual arbitration are protected under the Federal Arbitration Act of 1925.[10] Arbitration, an alternative to traditional litigation, is an informal

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generalized to all damages class actions. E.g., Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497, 516–19 (1991) (arguing that the meritoriousness of legal claims is a relatively weak determinant of whether securities class actions are filed and the size of the resulting settlements, and that the degree of decline in stock prices and the amount of insurance coverage are stronger determinants).

5. E.g., Martin H. Redish, Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit 2–3 (2009) [hereinafter Redish, Wholesale Justice] (arguing that class actions raise constitutional and political concerns because they "often revok[e]—either legally or practically—the individual right holder's ability to control the protection or vindication of his rights" and "often effect dramatic alterations in the DNA of the underlying substantive law"). For a rebuttal to these arguments, see Alexandra D. Lahav, Are Class Actions Unconstitutional?, 109 Mich. L. Rev. 993, 999–1009 (2011) (book review).

6. E.g., Susan P. Koniak & George M. Cohen, Under Cloak of Settlement, 82 Va. L. Rev. 1051, 1056–57 (1996) (claiming that "lawyer abuse in class actions is rampant" and proposing that there should be a threat of legal liability for lawyers in order to deter such abuse).

7. E.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 689–90 (1986) [hereinafter Coffee, Understanding the Plaintiff's Attorney] ("[P]laintiff's attorneys have an incentive to settle prematurely and cheaply when they are compensated on the traditional percentage of the recovery basis.").

8. See generally Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 745–823 (2013) (surveying federal case law that has made class actions more difficult for plaintiffs to bring); Robert H. Klonoff, Class Actions Part II: A Respite From the Decline, 92 N.Y.U. L. Rev. 971 (2017) (reviewing further developments in federal case law that represent a slowdown, though not a reversal, in the trend that class actions are becoming more difficult for plaintiffs to bring).

9. See infra notes 52–55 and accompanying text.

10. 563 U.S. 333, 352 (2011) (overturning a California common law rule that prohibited contracts from disallowing class-wide arbitration, finding that such a rule is preempted by the Federal Arbitration Act); see also Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1616 (2018) (upholding employment agreements requiring individual arbitration and dismissing a challenge based on the Federal Arbitration Act's saving clause and the National Labor Relations

and nonjudicial means of resolving disputes. In *individual* arbitration, a single claimant seeks redress for themselves, without anyone else being represented in the proceeding or bound by the outcome. Arbitration is relatively uncontroversial when the parties agree to it after the dispute arises, mutually availing themselves of a forum that may be cheaper, faster, or more tailored to the dispute than litigation in court.[11] But it is increasingly common for corporations to include provisions requiring individual arbitration in employment and consumer contracts, and for people to sign away the right to litigate in court *before* disputes arise.[12] Most people do not, and probably could not, bargain out of mandatory arbitration agreements, so there are few checks on their proliferation.[13] Given that most people bound by mandatory arbitration agreements cannot take part in class actions, there are likely to be fewer class actions wherever such agreements proliferate.[14] Proponents of class actions have called on Congress to

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Act); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 228 (2013) (holding that contractual agreements requiring individual arbitration cannot be invalidated on the ground that costs of individual arbitration exceed the potential recovery).

11. See *Concepcion*, 563 U.S. at 344–45 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets.").

12. See Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, Econ. Pol'y Inst. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ [https://perma.cc/ZWA8-DMDY] (reviewing empirical evidence of the growing trend of mandatory employee arbitration).

13. See *Epic*, 138 S. Ct. at 1637, 1643 (Ginsburg, J., dissenting) (discussing inequality of bargaining power between workers and employers).

One of the few downsides that corporations must consider when including mandatory arbitration provisions in contracts is the possibility that many people who would not otherwise litigate against the corporation will pursue arbitration. In such a scenario, mandatory arbitration agreements can backfire on the corporation, forcing it to pay arbitration fees for many disputes at once. While this has traditionally been viewed as unlikely, plaintiff-side law firms have recently introduced a tactic of mass arbitration, which involves coordinating large numbers of claimants to bring arbitration actions. This tactic has sometimes been remarkably effective. For example, it recently forced Amazon to remove a mandatory arbitration provision from its contract with customers. Michael Corkery, Amazon Ends Use of Arbitration for Customer Disputes, N.Y. Times (July 22, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html (on file with the *Columbia Law Review*) (last updated Sept. 28, 2021). Still, it appears unlikely that the mass arbitration tactic will be broadly replicated against small and midsize corporations or in the context of complicated disputes.

14. See John C. Coffee, Jr., Entrepreneurial Litigation: Its Rise, Fall, and Future 129 (2015) ("Over time, the use of arbitration clauses will only spread, predictably covering most persons in contractual relationships with a company and also applying to at least some tort claimants, disabling both groups from suing in court."); Brian T. Fitzpatrick, The Conservative Case for Class Actions 128 (2019) [hereinafter Fitzpatrick, The Conservative Case] ("The status quo is no longer lots and lots of class actions like it was before 2011. The status quo is now few and maybe no class actions.").

Not all mandatory arbitration agreements contain explicit waivers that prohibit participation in class actions and class arbitration, but courts are likely to interpret mandatory

intervene, recognizing that class actions are in peril if Congress does nothing.[15] Congress must decide whether class actions are worth saving.

But class action legislation is mired in partisan division. Democrats wish to preserve class actions, as demonstrated by the Forced Arbitration Injustice Repeal Act (FAIR Act), a bill that would render unenforceable any contractual agreements that bar class litigation of employment, consumer, antitrust, and civil rights disputes.[16] The FAIR Act was passed by a Democratic-controlled House of Representatives in September 2019, but it never became law.[17] By contrast, Republicans would weaken class actions further: In March 2017, a Republican-controlled House of Representatives passed the Fairness in Class Action Litigation Act (Fairness Act), a bill that would significantly restrict class actions.[18] Like the FAIR act, the Fairness Act never became law.[19] Class actions remain a live and urgent issue, with Democrats and Republicans rallied around opposing visions of reform. Even while Democrats control both houses of Congress and the presidency, their proposals are unlikely to become law due to the prospect of a Senate filibuster and possible dissent from conservative Democratic senators.[20] A path to compromise is needed if any reforms are to pass.

This Note explains that class actions are so contentious in part because of disagreements over what goals they are supposed to serve.[21] To assist in

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arbitration agreements as prohibiting participation in class proceedings even in the absence of such explicit waivers. See, e.g., Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1411 (2019) (holding that mandatory arbitration agreements that are silent or ambiguous as to the availability of class arbitration do not permit class arbitration).

15. See, e.g., *Epic*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting) ("Congressional correction of the Court's elevation of the [Federal Arbitration Act] over workers' rights to act in concert is urgently in order."); Fitzpatrick, The Conservative Case, supra note 14, at 125–27 (calling on Congress to amend the Federal Arbitration Act so as to reverse the outcome of *Concepcion*).

16. H.R. 1423, 116th Cong. (2019). For analysis of the FAIR Act, see infra section II.B.

17. See infra notes 141–142 and accompanying text.

18. H.R. 985, 115th Cong. (2017). Among other provisions, the Fairness Act would require courts to determine, as prerequisites to class certification, that "each proposed class member suffered the same type and scope of injury as the named class representative[s]" and that there is "a reliable and administratively feasible mechanism . . . for distributing directly to a substantial majority of class members any monetary relief secured for the class." Id. §§ 1716(a), 1718(a). For analysis of the Fairness Act, see infra section II.A.

19. See infra notes 120–121 and accompanying text.

20. See infra note 143 and accompanying text.

21. This fundamental disagreement over the purpose of class actions is often overlooked. It is sometimes recognized in academic commentary, but, even there, less often than one might expect. The following works identify approximately the same dichotomy in views as this Note discusses, with much variation in exactly how they distinguish the two sides of the disagreement and in what labels they use to describe them: John H. Beisner, Matthew Shors & Jessica Davidson Miller, Class Action "Cops": Public Servants or Private Entrepreneurs?, 57 Stan. L. Rev. 1441, 1442 (2005) (distinguishing between the view that class actions are a "means of resolving numerous commonly grounded controversies through a single lawsuit" and the view that they are "private law enforcement efforts" by "private attorneys general"); Sergio J. Campos, The Uncertain Path of Class Action Law, 40 Cardozo L. Rev. 2223, 2228

understanding these disagreements, this Note proposes a taxonomy of the goals of class actions. It first identifies two broad justifications for class actions: One justification is that class actions make litigation more efficient; the other justification is that class actions expand representation in litigation. In this Note's taxonomy, each of these two broad justifications is associated with two goals. Under the efficiency justification, one goal of class actions is to benefit plaintiffs by allowing them to save on the transactional costs of litigation, thereby increasing their net compensation;[22] the other goal is to benefit the public by increasing monetary deterrence against wrongdoing.[23] Under the representation justification, one goal of class actions is to benefit plaintiffs by including more of them in litigation;[24] the other goal is to benefit the public by giving rise to new and qualitatively different lawsuits that have outsized influence over laws and norms.[25] This Note observes that there is a tension between the two efficiency goals and the two representation goals. Efficiency goals are best furthered by the inclusion of *more valuable claims* in class actions while representation goals are best furthered by the inclusion of *more claimants* in class actions.

Using this taxonomy, this Note examines the current views of Republicans and Democrats through an analysis of the Fairness Act and the FAIR Act. This analysis shows that Republicans believe only in the goal of compensation while Democrats believe in the goals of providing access to justice and shaping laws and norms. This difference in views reveals two cleavages between Republicans and Democrats. One cleavage is that Republicans do not believe class actions serve any public purpose, whereas Democrats do. The other cleavage, which this Note identifies as being

(2019) (distinguishing between the "exceptional" view of class actions, which considers class actions to be a tool for efficiency and prioritizes the goal of allowing each individual their day in court, and the "alternative" view, which prioritizes substantive rights and values class actions as a tool for enforcing those rights); Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. Pa. L. Rev. 103, 105–07 (2006) (distinguishing between the "orthodox" approach of assuming that class actions are intended to compensate absent class members and the proposed view that their purpose is to deter more types of wrongdoing); Diane Wood Hutchinson, Class Actions: Joinder or Representational Device?, 1983 Sup. Ct. Rev. 459, 459–60 (distinguishing between the "joinder model," which views class actions as a device for efficient adjudication of claims that should be individually viable, and the "representational model," which embraces the inclusion of class members who could not have sued independently); Alexandra D. Lahav, Two Views of the Class Action, 79 Fordham L. Rev. 1939, 1941 (2011) (distinguishing between the view that class actions are "an advanced joinder device, merely aggregating individual cases" and the view that they represent "a transformative procedural rule that creates an entity out of a dispersed population of claimants"); Marcus, History of the Modern Class Action, supra note 1, at 592–94 (distinguishing between the "adjectival conception," which views class actions as serving the goal of procedural efficiency, and the "regulatory conception," which views class actions as a device for enforcing substantive law).

22. See infra notes 71–74 and accompanying text.

23. See infra note 76 and accompanying text.

24. See infra notes 78–82 and accompanying text.

25. See infra notes 83–85 and accompanying text.

deeper and more fundamental, is that Republicans align with the efficiency justification while Democrats align with the representation justification. These two views of class actions shape the current political debate—and political impasse—over class actions and mandatory arbitration agreements.

Despite these divisions, this Note argues that the goals of class actions are not inherently in conflict with one another and that political compromise is possible. If the efficiency goals and the representation goals were diametrically opposed, it would be difficult to see how the class action war could ever end. One side might achieve a particular legislative victory, but, if the past fifty years are any indication, the concerns of the opposing side would always reestablish themselves. Indeed, one might expect the class action war to continue for another fifty years. This Note rejects that vision and offers a path toward reconciling these goals. The approach advanced by this Note considers efficiency and representation to be equally important justifications for class actions, avoiding the typical notion that one predominates over the other. Instead, this Note presents a framework for distinguishing between those class actions that primarily serve efficiency goals and those class actions that primarily serve representation goals. This framework conceptually reconciles the goals of class actions and can guide courts toward a more expansive understanding of the policy interests behind class actions. Moreover, this Note argues that this reconciled understanding of class actions offers a path toward crafting legislative compromises that may be reasonably palatable to both Republicans and Democrats.

This Note proceeds in three Parts. Part I explains the goals of class actions, reviewing their historical context and describing their theoretical underpinnings. Part II explains that different views of the goals of class actions are motivating opposing Republican and Democratic legislative proposals related to class actions, as exemplified by the Fairness Act of 2017 and the FAIR Act of 2019. Part III proposes a framework for reconciling the goals of class actions and offers examples of legislative compromises that can be built on this reconciled understanding.

I. UNDERSTANDING THE CLASS ACTION WAR

This Part introduces the goals of class actions and contextualizes them within the class action war. These goals are divided between two broad justifications for class actions: efficiency and representation. Section I.A provides context by reviewing the aspects of class action history that are most relevant for understanding these two justifications. Section I.B presents a taxonomy of the goals of class actions, explaining the conceptual fault lines between them and highlighting expressions of these goals in jurisprudence and legal commentary.

A. *The Evolution of Class Actions*

This section provides historical context for the class action war and the goals of class actions. It summarizes the historical evolution of two foundational elements of class actions, which are now built into Rule 23: the commonality requirement and the binding effect on absent class members. This history demonstrates that class actions have long served two broad justifications: efficiency and representation.

In the United States, class actions have always been based on commonality of interest. Although this feature of class actions is the product of a long evolutionary process, that evolution predated the American class action.[26] Class actions were imported into American jurisprudence by Justice Joseph Story, who wrote that class treatment is appropriate "where the question is one of a common or general interest, and one or more sue, or defend for the benefit of the whole."[27] As its defining feature, a class action allows a group to be a single litigative entity.[28] While riding circuit, Justice Story decided the early class action *West v. Randall*, in which one of the heirs of an estate sued on behalf of himself and other heirs who were not before the court.[29] Justice Story wrote that while it is "a general rule in equity" that all individuals "materially interested" in a lawsuit should be

26. Class actions can be traced to British courts of equity, where class treatment was not always based on commonality of interest. Until the 1700s, class actions primarily involved cohesive groups, such as villages and manorial tenants, that had significant social or political meaning independent of the dispute. See Stephen C. Yeazell, Group Litigation and Social Context: Toward a History of the Class Action, 77 Colum. L. Rev. 866, 867 (1977).

By the time class actions arrived in the United States, courts were searching for justifications for class treatment other than group cohesiveness. See Stephen C. Yeazell, From Medieval Group Litigation to the Modern Class Action 160–96 (1987) [hereinafter Yeazell, From Medieval Group Litigation] (arguing that the relevance of group cohesion as a justification for class treatment eroded as Great Britain transformed from a rural and customary society to an individualistic and industrial one).

The trend toward applying class treatment based on commonality of interest is evident in *Good v. Blewitt*, in which the captain of a ship sued on behalf of himself and his crew, claiming they were owed their share of captures from the Napoleonic Wars. Good v. Blewitt (1807) 33 Eng. Rep. 343 (Ch.) 343. A crew of seamen bound together only by a single journey is not a particularly cohesive group. Nonetheless, the crew was given class treatment because the seamen had a common interest in the lawsuit and it would have been impractical to call them all before the court. Id. at 345 ("[T]heir situation at any period, how many were living at any given time, how many are dead, and who are entitled to representation, cannot be ascertained.").

27. Joseph Story, Commentaries on Equity Pleadings § 97 (1840). Justice Story also proposed two other categories of class action:

> (2) where the parties form a voluntary association for public or private purposes, and those, who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous, and though they have, or may have, separate and distinct interests; yet it is impracticable to bring them all before the court.

Id.

28. Yeazell, From Medieval Group Litigation, supra note 26, at 1.

29. 29 F. Cas. 718, 722 (C.C.D.R.I. 1820) (No. 17,424).

parties, that rule need not be followed when "consistently with practical convenience it is incapable of application."[30] The Supreme Court followed this example in *Smith v. Swormstedt*, in which two groups of Methodist preachers laid claim to a pension fund and the Court applied class treatment to both groups because of their common respective interests in the litigation.[31]

Various purposes of class actions were articulated during this early period, yet it was unclear which purpose, if any, was most important. Justice Story viewed class actions as serving a mix of different purposes, writing that the class action "does not seem to be founded on any positive and uniform principle; and therefore it does not admit of being expounded by the application of any universal theorem, as a test."[32] A slightly longer description was offered by the Lord High Chancellor Eldon in the British case *Cockburn v. Thompson*, later cited by Justice Story in *West*:

> The strict rule is, that all persons materially interested in the subject of the suit, however numerous, ought to be parties; that there may be a complete decree between all parties having material interests: but, that being a general rule established for the convenient administration of justice, must not be adhered to in cases to which, consistently with practical convenience, it is incapable of application.[33]

Lord Eldon's phrase "convenient administration of justice" elevates two justifications: efficiency and access to justice. This phrase also proves slightly mercurial on close inspection. Are the two justifications equal, or is one more salient than the other? Put differently, do class actions serve more to enhance the efficiency with which justice can be administered, or do they serve more to enhance how much justice, to how many people, can be administered? This question, left unresolved, has come to be one of the dividing lines between the present-day views of class actions.

Even though early American class actions included the commonality requirement, they were fundamentally different from modern class actions in that they were not always binding on absent class members. For over a century, American jurisprudence was indecisive about whether absent class

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30. Id. (citing Cockburn v. Thompson (1809) 33 Eng. Rep. 1005 (Ch.) 1007).

31. 57 U.S. 288, 303 (1853).

32. Story, supra note 27, § 76.

33. *Cockburn*, 33 Eng. Rep. at 1005 (cited by *West*, 29 F. Cas. at 722). The Supreme Court articulated approximately the same view in *Swormstedt*:

> Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court.

57 U.S. at 303.

members—those who had neither opted into the class nor opted out of it—were precluded from bringing the same claim in another lawsuit.[34] To the modern legal mind, nonbinding class actions hardly seem like class actions at all. Indeed, nonbinding class actions proved ineffective and were intentionally eliminated by the 1966 revisions to Rule 23, which imposed a binding effect on absent parties.[35] The failure of nonbinding class actions leading up to the 1966 revisions is worth elaborating on. It illuminates the two justifications for class actions discussed in this Note and demonstrates that both justifications had a role in shaping Rule 23. Nonbinding class actions failed for two reasons: They were inefficient, and they were not representative enough to properly administer justice.

The inefficiency of nonbinding class actions is exemplified by the 1944 case *York v. Guaranty Trust Co. of New York*.[36] A noteholder sued a trustee on behalf of himself and similarly situated noteholders, claiming the trustee had breached fiduciary obligations, but the Second Circuit determined that the lawsuit was not binding on absent class members.[37]

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34. Justice Story, always a patron of class actions, believed class actions should be binding on absent class members. Story, supra note 27, § 120 ("[I]n most, if not in all, cases . . . the decree obtained . . . will ordinarily be held binding upon all other persons standing in the same predicament, the Court taking care, that sufficient persons are before it, honestly, fairly, and fully to ascertain and try the general right in contest."). But Federal Equity Rule 48, promulgated in 1842, stated that class actions were *not* binding on absent class members. Rules of Practice for the Courts of Equity of the United States, 42 U.S. (1 How.) xxxix, lvi (1842) (superseded 1912) ("[T]he decree shall be without prejudice to the rights and claims of all the absent parties."). And yet, the Supreme Court upheld the binding effect on absent class members in cases such as *Swormstedt*. See *Swormstedt*, 57 U.S. at 303. In 1912, that approach was codified in the new Federal Equity Rule 38. Rules of Practice for the Courts of Equity of the United States, 226 U.S. 659 (1912) (superseded 1938); see also Christopher v. Brusselback, 302 U.S. 500, 505 (1938) (affirming that the new Federal Equity Rule 38, unlike the old Federal Equity Rule 48, permitted judgments to be binding on absent parties).

When the original Rule 23 was introduced in 1938, it provided no answer as to what effect judgments would have on absent class members. Advisory Comm. on Rules for Civil Procedure, Report Containing Proposed Rules of Civil Procedure for the District Courts of the United States 60 (1937); Benjamin Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 377–78 (1967). Nonetheless, Professor James W. Moore, one of the drafters of the original Rule 23, recommended that the effect of binding absent class members should not apply in the case of "spurious" class actions, which were capaciously defined in the original Rule 23 to include class actions involving "several" rights affected by a common question and related to common relief. James W. Moore & Marcus Cohn, Federal Class Actions—Jurisdiction and Effect of Judgment, 32 Ill. L. Rev. 555, 555–63 (1938) (Professor Moore's recommendation); see also Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (explaining the definition of "spurious" class actions under the original Rule 23). Professor Moore's recommendation was influential in the period predating the 1966 revisions to Rule 23. Kaplan, supra, at 378–79.

35. See infra note 48 and accompanying text.

36. 143 F.2d 503 (2d Cir. 1944), rev'd on other grounds, 326 U.S. 99 (1945).

37. Id. at 508–12, 528. The Second Circuit determined that the case would not be binding on absent class members because it fell into the category of a "several" class action. Id. at 528.

The Second Circuit realized that allowing class treatment without any effect on parties who were not before the court would be "purely academic and lack all practical significance," particularly because the claims of absent class members would lapse and they would be unable to seek relief.[38] So the Second Circuit tried a workaround that did not involve binding absent class members: If a judgment was made against the defendant, other class members would later have the opportunity to opt in, but they would not be bound if they remained silent.[39] This approach became known as "one-way intervention." While it may have appeared to be an appealing middle ground at the time of *Guaranty Trust*, it turned out to be utterly impractical. The problem with one-way intervention was that it prevented defendants from settling their liabilities: If the defendant lost, they were uncertain of which plaintiffs might sue them again, as absent plaintiffs were not barred from pursuing future claims; even if the defendant won, only the named plaintiffs were precluded from making another attempt at obtaining a favorable judgment.[40] In turn, the inability to offer complete resolution implied the class would have difficulty negotiating an adequate settlement. By extending judgments to absent class members, the 1966 revisions intentionally eliminated the inefficiencies of nonbinding class actions and one-way intervention.[41]

The importance of the binding effect for the purpose of representation is evident in the 1951 case *Wilson v. City of Paducah*, in which two Black students sued for admission to a college on behalf of themselves and similarly situated applicants.[42] The district court allowed the case to proceed as a class action, and after finding that the students possessed the qualifications required of white applicants it issued an injunction requiring that they be granted admission.[43] In this case, unlike in *Guaranty Trust*, the district court took the position that the class action was binding on absent class members: When two other Black students not named in the original complaint intervened, the district court considered them to be members of the class who could take advantage of the original judgment, and it once again enjoined the defendant from denying admission.[44] The 1966 revisions were written in the early 1960s, with an awareness of such civil rights

38. Id. at 528.

39. Id. at 529.

40. See Kaplan, supra note 34, at 385 ("[One-way intervention] was distasteful as being 'one-way,' as lacking 'mutuality': for it was assumed that members of the class could remain outside the action if the determination were adverse to their interests and in that event they would not be bound.").

41. Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment ("[O]ne-way intervention is excluded; the action will have been early determined to be a class or nonclass action, and in the former case the judgment, whether or not favorable, will include the class."); Kaplan, supra note 34, at 397 ("The [new] rule has advantages for the defendant, too, in that it attempts to conclude the class when the decision is unfavorable to it.").

42. 100 F. Supp. 116, 117 (W.D. Ky. 1951).

43. Id.

44. Id. at 117–18.

litigation.[45] The drafters considered the example of *Paducah* and recognized that the students not named in the original complaint were only able to benefit from the original judgment because the district court had viewed it as binding on absent class members.[46] This would have been a denial of justice, not merely an inefficiency, as students are unlikely to pursue such lawsuits on an individual basis.[47]

The 1966 revisions to Rule 23 introduced the modern framework for class actions. The failures of nonbinding class actions had been manifested in both their inefficiency and their unrepresentativeness. The new Rule 23 made judgments resulting from class actions binding upon all class members: The entire class has a chance to benefit if the class action succeeds and, in exchange, the entire class is precluded from reintroducing the same claim.[48] The 1966 revisions also codified a structure that all first-year law students learn: Class actions are subject to the threshold requirements of numerosity, commonality, typicality, and adequacy;[49] class actions are categorized into those for avoiding inconsistent judgments, those for injunctive relief, and those for damages;[50] and class actions for damages are subject to the additional requirements of predominance and superiority.[51]

But even as the major features of modern class actions took shape, it remained unclear whether the primary justification for class actions was efficiency or representation. No answer had been provided by the history of class actions preceding the 1966 revisions to Rule 23. Nor was any answer provided by the 1966 revisions, which, in their major innovation of

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45. Miller, Of Frankenstein Monsters and Shining Knights, supra note 1, at 670 n.31 ("Although not promulgated until 1966, the basic text of the current rule actually was drafted by the Advisory Committee on Civil Rules in 1961 and 1962 . . . . [A]s a practical matter the contours of the new rule had become firm by 1964."). The new Rule 23 was worked on with an awareness of early civil rights cases and an appreciation of the class action's usefulness in the civil rights context, even though it predated the wave of civil rights litigation in the 1960s. Id. at 670.

46. Kaplan, supra note 34, at 383.

47. Professor Marcus has argued that the binding effect allowed class actions to advance desegregation in two ways: Binding class actions did not become moot due to the changed circumstances of an individual plaintiff, such as a student graduating, and they also forced injunctive relief to be broadly tailored so as to actually change institutional practices of discrimination. David Marcus, Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action, 63 Fla. L. Rev. 657, 679–80 (2011).

48. Fed. R. Civ. P. 23(c)(3). The preclusive effect of class actions is softened by the requirement that class members be notified of the class action and given the opportunity to opt out. Fed. R. Civ. P. 23(c)(2)(B)(v).

49. Fed. R. Civ. P. 23(a) (stating that the class must be "so numerous that joinder is impracticable," the class must have commonality of interest, the representative party must be "typical of the claims or defenses of the class," and the representative party must be able to "fairly and adequately protect the interests of the class").

50. Fed. R. Civ. P. 23(b).

51. Fed. R. Civ. P. 23(b)(3) (requiring that questions common to all class members predominate over questions affecting individual members, and that a class action be superior to other methods of adjudication).

making class actions binding on absent class members, had served the purposes of both efficiency and representation.

Political battles over class actions began soon after the 1966 revisions to Rule 23. In 1969, Senator Joseph D. Tydings introduced a bill that would have expanded the reach of Rule 23 by establishing federal jurisdiction over class actions alleging state law claims.[52] President Richard Nixon introduced a more restrictive proposal, which would have limited federal jurisdiction to eleven types of fraud and would only have allowed class actions to proceed after the DOJ took action to stop the wrongdoing.[53] Senator Tydings pushed back, advocating for a strong class action regime in order to protect consumer rights.[54] In 1970, hearings over the two competing bills turned into an intense political battle that has never truly ended.[55]

B. *The Goals of Class Actions*

This section presents a taxonomy of the goals of class actions. It proposes that these goals have usually defined the battle lines in the class action war, as most doctrinal and political debates over class actions involve the various factions siding with certain goals over others. This taxonomy begins with the two broad justifications section I.A introduces: efficiency and representation. Each of these justifications corresponds to two goals. This section reviews the theoretical underpinnings of these goals and observes that there is a meaningful tension between the efficiency goals and the representation goals.

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52. S. 1980, 91st Cong., 1st Sess. (1969). At the time, Rule 23 was considered more friendly than class action procedures at the state level. Class Action and Other Consumer Protection Proceedings: Hearings Before the Subcomm. on Com. and Fin. of the Comm. on Interstate and Foreign Com., 91st Cong. 37 (1970) (statement of Sen. Tydings) (discussing the "liberal machinery" of Rule 23). Senator Tydings's bill was intended to reverse the effects of *Snyder v. Harris*, in which the Supreme Court held that the amount in controversy needed to satisfy the federal diversity jurisdiction statute could not be aggregated across class members, effectively denying federal subject matter jurisdiction over most class actions that were based on state law claims. 394 U.S. 332, 336 (1969); see also Zahn v. Int'l Paper Co., 414 U.S. 291, 301 (1973) (clarifying that any plaintiff who does not satisfy the jurisdictional amount must be dismissed from the class action). *Snyder v. Harris* became obsolete when the federal supplemental jurisdiction statute became law in 1990. 28 U.S.C. § 1367(a) (2018); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558–59 (2005) (holding that if one member of the class satisfies the jurisdictional amount requirement, a court may exercise supplemental jurisdiction over class members whose claims do not meet the jurisdictional amount requirement on their own).

53. See Robert B. Semple, Jr., Nixon Proposes a "Bill of Rights" for Consumers, N.Y. Times (Oct. 31, 1969), https://nyti.ms/1RRdJ5s (on file with the *Columbia Law Review*).

54. See Joseph D. Tydings, The Private Bar—Untapped Reservoir of Consumer Power, 45 Notre Dame L. Rev. 478, 479 (1970) ("[T]he consumer must be given an adequate private remedy in court. No administrative agency can possibly guard the rights of millions of individual consumers or process the thousands of complaints that would be received each year.").

55. See Marcus, History of the Modern Class Action, supra note 1, at 611–12.

The goals of class actions are separated by a simple divide: Efficiency goals suggest that class actions amplify the effects of litigation that can exist without class actions, while representation goals suggest that class actions make litigation have qualitatively different effects. The goals are also cross-divided according to whether they serve the interests of plaintiffs or the broader public. This results in a taxonomy of four goals: The two efficiency goals are increasing compensation to plaintiffs and increasing monetary deterrence against misbehavior; the two representation goals are providing access to justice to plaintiffs and shaping laws and norms against misbehavior.

Before delving in, it is worth introducing two concepts that will prove useful for understanding the distinctions between these four goals. First, this Note uses the term "valuable claim" to describe a claim that is sufficiently large that a class member could potentially achieve compensation outside of the class action. The more valuable the claim, the more the claimant is in a position to care about how much they are compensated through the class action. If a claim is not valuable, the claimant may be assumed to be content to have any access to justice at all. The concept of a valuable claim is a younger sibling to the well-known concept of a positive-value claim, which is a claim that is sufficiently large that the payout is expected to exceed the cost of litigating the claim on an individual basis.[56] Positive-value claims are the *most* valuable claims, as a positive-value claimant has a clear incentive to litigate their claim with or without the class, though they will still tend to participate in a class action if it increases their net compensation.[57] By contrast, a negative-value claim is one for which the cost of litigating the claim on an individual basis is expected to be greater than the benefit.[58] But negative-value claims can still be somewhat valuable. If they are sufficiently large, such claims can be added on to other lawsuits through traditional joinder. In some circumstances, sufficiently large negative-value claims may be worth pursuing through alternative dispute resolution mechanisms such as arbitration. One could even argue that small claims that can only be compensated through a class action can still be considered *slightly* valuable, in the narrow sense that the claimant could hope to be better compensated through a different class action. Some claims have no value at all, as they are

56. See John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 904 (1987) (describing "independently marketable" claims for which "the client could convince an attorney to take the case on a contingent fee basis or . . . the client would herself pay the attorney on some other basis").

57. See id. (describing the benefits to positive-value claimants as consisting of economizing on litigation costs, threatening risk-averse defendants with greater liability so as to push them to settle, and avoiding a "race to judgment" among competing plaintiffs).

58. See Samuel Issacharoff, Preclusion, Due Process, and the Right to Opt Out of Class Actions, 77 Notre Dame L. Rev. 1057, 1059–60 (2002) (defining negative-value claims); see also Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (observing that class treatment may permit plaintiffs with claims averaging $100 to pool their claims, thereby transforming them into claims that are viable to litigate).

so small that the claimant would not even bother to collect the money offered to them.[59] The overall point is that class treatment impacts nonvaluable claims more dramatically than valuable claims, as it makes nonvaluable claims feasible to pursue.[60] This echoes Lord Eldon's distinction between convenience and justice:[61] For those with valuable claims, class actions are a matter of convenience, as they make it even more cost-effective to litigate; for those with nonvaluable claims, class actions are a matter of justice, as it is not otherwise feasible to seek redress at all.

Also relevant is the distinction between the private effects of class actions and the public effects of class actions. Private effects are those effects that class actions have on the parties to litigation—plaintiffs and defendants, including members of the class—while public effects are any effects that class actions have on nonparties, or the public at large.[62] It is not immediately obvious from the text or history of Rule 23 that class actions are supposed to have public effects.[63] Yet the idea that they do is pervasive,

59. For an example of the negative correlation between the size of the claim and the likelihood that the class member will actually collect the money, see Brian T. Fitzpatrick & Robert C. Gilbert, An Empirical Look at Compensation in Consumer Class Actions, 11 N.Y.U. J.L. & Bus. 767, 784 (2015) ("[T]he size of class members' payouts influenced negotiation rates: class members were more likely to negotiate larger denomination checks than smaller denomination ones.").

60. Moreover, there is no downside to participating in a class action for claimants with nonvaluable claims. By contrast, participating in a class action can be a double-edged sword for claimants with valuable claims. It is possible that a class action will achieve a smaller compensation amount than such claimants could achieve on their own, particularly if the settlement fails to recognize special circumstances that entitle them to greater compensation than other members of the class. In such situations, claimants with valuable claims are able to opt out of the class action and pursue their own lawsuit. See Fed. R. Civ. P. 23(c)(2)(B)(v) (requiring that members of class actions for damages be notified of their right to request to be excluded from the judgment).

61. See supra note 33 and accompanying text.

62. The following works have explicitly discussed the distinction between private and public effects of class actions: J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1217 (2012) (arguing that private litigation, including through class actions, plays an "important yet often underappreciated structural role . . . in our diffuse, decentralized regulatory system"); Alexandra D. Lahav, The Political Justification for Group Litigation, 81 Fordham L. Rev. 3193, 3193 (2013) [hereinafter Lahav, Political Justification] ("[W]hat legitimates the class action best is the role it plays in the larger polity rather than the internal protections it offers participants."); William B. Rubenstein, Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action, 74 UMKC L. Rev. 709, 710 (2006) [hereinafter Rubenstein, Positive Externalities] ("The class action mechanism is important not just because it enables a group of litigants to conquer a collective action problem and secure relief, but also—perhaps more so—because the litigation it engenders produces external benefits for society."); see also James D. Cox, Response, Securities Class Actions as Public Law, 160 U. Pa. L. Rev. PENNumbra 73, 73 (2011) [hereinafter Cox, Securities Class Actions] (offering a criticism of "the narrow view that securities class actions have only a private and not a public mission").

63. The 1966 revisions were motivated by a desire to provide a better mechanism for private remedies. See Miller, Of Frankenstein Monsters and Shining Knights, supra note 1, at 669 ("The Advisory Committee's objectives in rewriting [Rule 23] were rather clear. It had few, if any,

perhaps being most frequently invoked in the idea that class actions deter harmful conduct by increasing the monetary cost of engaging in such conduct.[64] Perhaps not as commonly, commentators have also suggested that class actions provide a public benefit by advancing laws and norms.[65] The distinction between public and private effects is also captured in the concept of the "private attorney general," which entered into widespread legal parlance soon after the 1966 revisions to Rule 23.[66] Although the exact definition proves elusive, the concept of the "private attorney general" suggests that either litigants or attorneys involved in class actions serve a mix of private and public functions.[67] In general, the idea that class actions provide public benefits is powerful, as it implies there is more at stake in class actions than at first meets the eye.[68] As this section explains, each of the two justifications for class actions aligns with a distinct idea of how class actions are supposed to provide public benefits.

The taxonomy presented in this section examines the goals of class actions from the vantage point of two key groups of stakeholders: plaintiffs and the general public. It is worth acknowledging that there are other stakeholders who may benefit from class actions. For example, class actions can benefit courts by allowing more economical adjudication of disputes.[69]

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revolutionary notions about its work product . . . . [T]he draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies."); see also Fed. R. Civ. P. 23 advisory committee's note to 1966 amendment (describing the categories of the original Rule 23, which were eliminated by the changes to Rule 23, as "obscure and uncertain"). See generally Kaplan, supra note 34, at 375–400 (discussing at length the reasons behind the 1966 revisions to Rule 23).

64. See infra note 76 and accompanying text.

65. See infra notes 83–85 and accompanying text.

66. See William B. Rubenstein, On What a "Private Attorney General" Is—And Why It Matters, 57 Vand. L. Rev. 2129, 2135 n.32 (2004) [hereinafter Rubenstein, Private Attorney General] (tabulating the use of the term "private attorney general" by decade and finding a significant increase between the 1960s and the 1970s). The general concept was described, however, before the term "private attorney general" was coined. See Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684, 715–17 (1941) (articulating a view that class actions serve as a supplement to government regulation by allowing private attorneys to correct wrongdoing missed by regulators).

67. Rubenstein, Private Attorney General, supra note 66, at 2130–31. Professor William B. Rubenstein suggests that where a case falls along the public–private gradient depends upon three core factors: (1) whether the client is the public or a private party (or, for that matter, a class of private parties); (2) whether the attorney is compensated through a fixed salary or in some fashion compensated conditionally on working on or succeeding in the lawsuit; and, (3) most importantly, whether the goal of deterrence is prioritized above the goal of compensation. Id. at 2137–42.

68. The idea that class actions serve an important public goal can be invoked to call for a degree of tolerance of apparent problems in class actions, such as attorney's fees being out of proportion to rates of compensation. See, e.g., Cox, Securities Class Actions, supra note 62, at 73–79 (defending securities class actions based on the fraud-on-the-market theory against the criticism that they are ineffective at compensation by arguing that they advance public welfare).

69. See, e.g., Gen. Tel. Co. of S.W. v. Falcon, 457 U.S. 147, 155 (1982) ("[T]he class-action device saves the resources of both the courts and the parties by permitting an issue

They sometimes even benefit defendants, as they provide defendants the ability to resolve class-wide liabilities all at once.[70] These could be considered "goals" of class actions, yet they are not described in the taxonomy presented here. Given that this is a taxonomy of the goals of class actions, the possible downsides of class actions are not the focus either. These topics should not be discounted. This section proposes, however, that the taxonomy presented here is the best starting point for understanding the battle lines in the class action war.

1. *Efficiency Goals*. — The efficiency justification suggests that class actions amplify the benefits of litigation not through qualitative change, but by making lawsuits more effective at achieving the benefits they are already capable of achieving without class treatment. Under this justification, the private goal of class actions is to reduce the cost of litigation, which allows plaintiffs to increase their net compensation. The Supreme Court expressed this view in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, in an opinion written by Justice Antonin Scalia:

> A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.[71]

Many of those who believe in the goal of compensation consider changes to *who* takes part in litigation to be a mere byproduct. In *Shady Grove*, Justice Scalia acknowledged that "some plaintiffs who would not bring individual suits for the relatively small sums involved [would] choose to join a class action" but downplayed the significance of this effect, stating that it has "no bearing . . . on [the defendants'] or the plaintiffs' legal rights."[72] He also argued this effect is consistent with the procedural mandate of the

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potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." (second alteration in original) (internal quotation marks omitted) (quoting Califano v. Yamasaki, 442 U.S. 682, 701 (1979))); Roger Bernstein, Judicial Economy and Class Actions, 7 J. Legal Stud. 349, 363–66 (1978) (presenting data suggesting that class actions result in greater aggregate recovery amounts and per-person recovery amounts per unit of judicial time); Edward F. Sherman, Class Actions and Duplicative Litigation, 62 Ind. L.J. 507, 507 (1987) ("By trying a group of similar cases together in a single suit, the class action promises to prevent the unnecessary waste of judicial resources and the possibility of inconsistent judgments.").

70. See supra notes 40–41 and accompanying text. Indeed, there was once great deal of concern that the 1966 amendments would make Rule 23 friendlier to defendants because, it was believed, defendants would be able collude with plaintiff's attorneys to settle class-wide liabilities cheaply. See Brian T. Fitzpatrick, The Ironic History of Rule 23, at 7 (Vand. L., Rsch. Paper No. 17-41, 2017), https://ssrn.com/abstract=3020306 [https://perma.cc/9L93-TKT9]. Concerns over this kind of collusion continue to be expressed by some commentators, though they have been mitigated by the expanded role of trial courts in reviewing settlement agreements. See infra notes 100–101. Even if settlements are not collusive, it is reasonable to think that some defendants may prefer the finality offered by class litigation.

71. 559 U.S. 393, 408 (2010).

72. Id.

Rules Enabling Act[73] because it is merely an "incidental effec[t]."[74] This implies that the *non*incidental effect of class actions is aggregating valuable claims, as opposed to nonvaluable claims. By reducing the transactional costs associated with litigation, class actions increase the net compensation that plaintiffs gain from litigation. Thus, under the efficiency justification, the private goal of class actions boils down to increasing the compensation of plaintiffs with valuable claims.

Class actions may also be seen as serving a public goal of increasing monetary deterrence against misbehavior.[75] This goal also fits under the efficiency justification because, like the goal of increasing compensation, it is a way for class actions to amplify the existing benefits of litigation rather than to change the character of litigation. Many commentators have argued that class actions reduce misbehavior by making wrongdoers internalize more of the cost of their violations.[76] Of course, one reason for this is that class actions include nonvaluable claims along with valuable claims, and in the aggregate these nonvaluable claims can increase monetary deterrence. The fact that class members are opted in by default also makes

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73. 28 U.S.C. § 2072 (2018) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence . . . . Such rules shall not abridge, enlarge or modify any substantive right.").

74. *Shady Grove*, 559 U.S. at 408 (alteration in original).

75. This Note uses the term "monetary deterrence" to avoid an ambiguity that is often present in discussions of deterrence, particularly in the context of class actions. *Monetary* deterrence only refers to changes in behavior that are motivated by the financial penalties imposed through litigation. This does not include changes in behavior caused by the mere existence of litigation, which may operate through "softer" mechanisms, such as fear of reputational damage or a desire to abide by laws and norms. This Note includes such effects in the category of "shaping of laws and norms." See infra section I.B.2.

76. E.g., Richard A. Posner, Economic Analysis of the Law 803 (9th ed. 2014) ("[W]hat is most important from an economic standpoint is that the violator be confronted with the costs of his violation—this preserves the deterrent effect of litigation—not that he pay them to his victims."); James D. Cox, The Social Meaning of Shareholder Suits, 65 Brook. L. Rev. 3, 39–40 (1999) [hereinafter Cox, Shareholder Suits] (arguing that deterrence is a more important goal than compensation); Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. Legal Stud. 47, 60–61 (1975) (proposing that deterrence can serve as an independent justification for class actions); Fitzpatrick, The Conservative Case, supra note 14, at 103–13 (arguing that class actions deter wrongdoing); Gilles & Friedman, supra note 21, at 105 (arguing that deterrence is a more important goal than compensation); Beverly C. Moore, Jr., Does It Go Far Enough?, 63 A.B.A. J. 842, 842 (1977) ("The primary function of the class action is deterrence of harmful conduct . . . . Judicial efficiency and compensation of small claimants are merely desirable by-products.").

Professor John C. Coffee, Jr. has also argued that class actions are more effective at creating monetary deterrence than other public benefits because plaintiff's attorneys inherently tend to focus on less controversial cases with large amounts of money at stake. See John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working, 42 Md. L. Rev. 215, 230–36, 280–84 (1983) (arguing that the plaintiff's attorney is risk averse and pursues relatively uncontroversial cases that represent a safe bet); Coffee, Understanding the Plaintiff's Attorney, supra note 7, at 682 (arguing that plaintiff's attorneys gravitate toward areas of law where "search costs" for quality cases are lowest).

participation more likely because some might prefer not to actively take an adversarial stance against a defendant with whom they might have future dealings. The goal of monetary deterrence is also compatible with the goal of compensation. Both of these goals are furthered by the inclusion of more valuable claims and are not furthered by the inclusion of more claimants per se. Additionally, joining together well-compensated class members enables better-funded lawsuits, which are more likely to achieve large awards or settlement amounts when facing well-funded defendants. It is important to recognize, however, that the goals of compensation and monetary deterrence are also separable, and it is possible to believe in one goal but not the other.[77]

2. *Representation Goals*. — The representation justification suggests that class actions make litigation better through qualitative change, by enabling lawsuits to represent more people and more grievances. Under this justification, the private goal of class actions is to provide access to justice to more claimants. The Supreme Court articulated this view in *Amchem Products, Inc. v. Windsor*, in which Justice Ruth Bader Ginsburg wrote that "[w]hile the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high," in designing the 1966 revisions to Rule 23 "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"[78] Justice Ginsburg elaborated on this point by quoting the Seventh Circuit case *Mace v. Van Ru Credit Corp.*:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[79]

Under this view, the priority is including more people with nonvaluable claims in the lawsuit, as they are least likely to otherwise obtain access to justice.

Those who believe in the goal of access to justice often consider the amount that plaintiffs are compensated to be a secondary priority. In *Van Ru*, a class action was brought on behalf of people who had received threatening debt collection letters.[80] The district court denied certification in part because it concluded the recovery would be limited to a "de minimis" amount of twenty-eight cents per class member.[81] On appeal, the Seventh

77. As section II.A discusses, congressional Republicans endorse the goal of compensation but not the goal of monetary deterrence. See infra notes 106–107 and accompanying text.

78. 521 U.S. 591, 617 (1997) (quoting Benjamin Kaplan, A Prefatory Note, 10 B.C. Indus. & Com. L. Rev. 497, 497 (1969)).

79. Id. (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

80. *Van Ru*, 109 F.3d at 340–41.

81. Id. at 344.